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IN THE

Supreme Court of the United States

October Term 1953

No. [redacted]-78 1

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of Ralph R. Huesman, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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SUBJECT INDEX

PAGE

Photograph of property involved.....Frontispiece

Petition for Writ of Certiorari to the Supreme Supreme Court of the State of California..... 1

A.

Summary statement of the case..... 2

B.

Statements disclosing basis of jurisdiction..... 10

C.

Questions presented 11

D.

Reasons relied on for allowance of writ..... 13

Brief in Support of Petition for Writ of Certiorari..... 17

I.

Opinions below 17

Supreme Court of California..... 17

The District Court of Appeal of California..... 17

II.

Jurisdiction 18

III.

Statement of the case..... 18

IV.

Specifications of errors..... 18

PAGE

V.

Argument 19

Summary of argument 19

Point 1. By limiting unreasonably the use of petitioners' property, respondent City's zoning ordinance deprives petitioners of a substantial right therein without compensation in violation of the due process clause of the Fourteenth Amendment 20

Point 2. Section 10 of said ordinance cannot be justified under the police power 24

A. Public safety of residences constructed on pilings on petitioners' property 25

B. Construction of residences on pilings on petitioners' property would not affect public morals 29

C. The police power is subordinate to constitutional limitations 31

Point 3. The evidence shows that the motives of respondent City in enacting said zoning ordinance were wrongful. The holding of the Supreme Court of California that such motives were immaterial is erroneous and conflicts with the rulings of this court 32

Conclusion 37

Appendix A. Section 10 of Zoning Ordinance No. 502 of respondent City of Manhattan Beach ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587	13, 14, 23
Chicago, Burlington & Quincy Ry. v. Drainage Commissioner, 200 U. S. 561	31
City of Manhattan Beach v. Cortelyou, 10 Cal. 2d 653, 76 P. 2d 483	3, 20, 32
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	30
Cusack Co. v. City of Chicago, 242 U. S. 526	19
Dobbins v. Los Angeles, 195 U. S. 223	11, 14, 30, 35, 37
Eaton v. Sweeny, 257 N. Y. 176, 177 N. E. 412	13, 23
Eubank v. Richmond, 226 U. S. 137	31
Grand River Dam Authority v. Grand-Hydro, 335 U. S. 368	14, 35
Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N. E. 2d 195	14, 35
Householder v. Town of Grand Island, 114 N. Y. S. 2d 852	13, 23
Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10	35
McCarthy v. City of Manhattan Beach, 257 P. 2d 679	8, 9, 10, 34, 35
Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613	13, 23, 31
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	11, 13, 23, 37
Scholl v. Borough of Yeadon, 148 Pa. Super. 601, 26 A. 2d 135	13, 23
Seattle Trust Co. v. Roberge, 278 U. S. 116	11, 13, 23
State v. Cincinnati Gas-Light & Coke Co., 18 Ohio St. 262	14, 35, 36
State ex rel. Tingley v. Gurda, 209 Wis. 63, 243 N. W. 317	35
Truax v. Corrigan, 257 U. S. 312	11, 25
Yick Wo v. Hopkins, 118 U. S. 356	11, 36
Zang & Sons Builders, Inc. v. Taylor, 102 A. 2d 723	22

STATUTES PAGE

Deering's California General Laws, Act 5211b..... 10
Manhattan Beach City Ordinance No. 502, Sec. 10.....
.....4, 5, 6, 10, 11, 12, 14, 18
19, 23, 24, 29, 30, 31, 32, 37
Planning Act (Stats. 1929, Chap. 838)..... 10
United States Code, Title 28, Sec. 1257..... 10
United States Constitution, Fourteenth Amendment.....
.....18, 19, 24, 29, 30, 32
United States Constitution, Fourteenth Amendment, Sec. 1..... 10

TEXTBOOK

7 MacQuillan, Municipal Corporations (3rd Ed.), p. 490, par. 24.505 21

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No. .....

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of Ralph R. Huesman, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners above named respectfully petition for writ of certiorari to review a decision of the Supreme Court of California (41 Cal. 2d 879, 264 P. 2d 932) [R. 367] rendered December 30, 1953. A timely petition for rehearing was denied January 27, 1954 [R. 387]. Said decision holds valid a zoning ordinance of respondent City restricting petitioners' property (see frontispiece) to playground purposes and prohibiting all structures except lifeguard towers, open smooth wire fences and small signs.

A.
Summary Statement of the Case.

Petitioners own approximately three-fifths of a mile of ocean beach frontage in the respondent City of Manhattan Beach. The parcel varies in width from 174 feet to 184 feet and borders the Pacific Ocean on the west. It lies between lines 1 and 2 on the aerial photographs reproduced in the frontispiece [based on Pltfs. Exs. 1 and 2]. The structure crossing petitioners' property is a municipal pier erected by respondent City on an easement granted for street purposes by petitioners' predecessor in interest [Ex. 10].

On the north, petitioners' property is bordered by public ocean beach. In 1925 said property was subdivided into residential lots and the map of said subdivision was approved by respondent's City Council [Ex. 5]. Prior to the adoption of the challenged zoning ordinance, said property was acquired by the State and has since been used as a state park [R. 258; Ex. 3].

On the south, petitioners' property is bordered by public ocean beach acquired and owned by the adjoining City of Hermosa Beach [Exs. 3 and 12]. Privately owned beach property beginning at approximately 130 feet south of the south line of petitioners' property has been used and improved for residential purposes for more than thirty years [R. 151; Exs. 1, 2 and 18]. These houses are clearly visible on the two photographs reproduced in the frontispiece.

On the east, petitioners' property is bordered by a strip of land 50 feet wide which was used as an electric railway right of way until 1941 [Fdg. II, R. 37]. Thereafter said strip was acquired by the State and has since been

used as a state park [Par. VI, Comp., R. 12; Par. V of Answer, R. 31; Ex. 3]. Eleven dedicated and accepted public streets (ten unimproved) cross said strip of land. Ten of said streets terminate at the east line of petitioners' property [Exs. 4, 6, 7, 9, 10 and 11]. Immediately east of said electric railway right of way is a public walkway known as The Strand adjoining which is private property which has been zoned and used for commercial and residential purposes long prior to the adoption of the challenged zoning ordinance [R. 236-237, 306; Ex. 3].

From 1923 until the passage of the challenged zoning ordinance in 1941 petitioners' property was zoned for residential purposes [Exs. 14 and 15].

In 1924 the respondent City, claiming to own the property in question, instituted an action in the state courts for the purpose of quieting title in respondent City. The contention of the City in said action was that the property had been dedicated for public use. In February, 1938, the Supreme Court of California held that the City's claim was without merit (*City of Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653, 76 P. 2d 483).

Shortly after the decision in the *Cortelyou* case and on numerous occasions prior to the adoption of the zoning ordinance in question, respondent, through the City Council and its other officials, requested the County of Los Angeles and the State of California to acquire petitioners' property for park purposes by purchase or eminent domain proceedings while the property remained unimproved.[1] Respondent City was unsuccessful in its efforts

[1]Exs. 20, 21, 23, 25, 26, 29, 39 and 40.

to induce the County of Los Angeles or the State of California to obtain petitioners' property for public use.

In July, 1940, petitioners attempted to enclose their property with a smooth wire fence. The public destroyed the fence before it was completed [R. 131; Ex. 36]. On July 30, 1940, Mr. McCarthy informed the City Council by letter of such destruction and demanded respondent City protect petitioners' property [Ex. 37]. The fence was so damaged by the public that it was necessary to remove it entirely from the premises [R. 322].

In 1940 and 1941 respondent's Planning Commission, assisted by a zoning expert of the County of Los Angeles prepared the zoning ordinance in question [R. 250-251, 303]. On June 26, 1941, neither the County nor the State having come to respondent City's aid, the City Council adopted the challenged Ordinance No. 502 [Ex. 1 to Comp., R. 20A-20C].

For eighteen years immediately prior to the adoption of the ordinance here under attack, petitioners' property had been zoned for residence purposes. Despite this fact the challenged ordinance rezoned petitioners' property and limited its use to beach recreation purposes. Petitioners' property was the only privately owned parcel of *ocean frontage* in respondent City that was so zoned. The electric railway right of way, heretofore mentioned, was the only other parcel of privately owned land within the city limits included within the beach recreation zone [map, a part of Ex. 1 to Complaint (see original certified record)].

Section 10 of said ordinance (printed in the Appendix hereto) states the uses to which petitioners' property may

be put and the improvements that may be constructed thereon. The only uses permitted are:

> (a) "beach recreation activities" (swimming, surf fishing and athletics) for which an admission fee may be charged, and
>
> (b) the rental of certain beach equipment (back rests, umbrellas, kayaks, canoes, small boats, etc.)

The only structures that may be erected thereon are smooth wire fences, lifeguard towers and small signs. Restrooms, dressing rooms, refreshment stands, parking lots, or buildings for storage of equipment (that may be rented) are not permitted [Ordinance No. 502, Sec. 10; Appendix, p. 1].

In 1948 the State, exercising the right of eminent domain, commenced proceedings to condemn petitioners' property for public park purposes. Said action is at issue but has not been set for trial [41 Cal. 2d 879, 884; R. 369].

In 1950 petitioners applied to the Planning Commission of respondent City to change the zoning of petitioners' property from the limited Beach Recreation purposes to residence purposes. In said application petitioners challenged the validity of said ordinance claiming that it

> "is unreasonable, arbitrary and discriminatory and not reasonably necessary for the health, safety, morals or general welfare of the community, and in fact acts as a taking or damaging of said private property without compensation and without due process of law" [Alleged, Comp., R. 15; not denied, Ans., R. 32].

The Planning Commission denied said application [Ex. 49] and the City Council likewise denied said appli-

cation [Resolution No. 1551, Ex. 3 to the Comp.; R. 21-28; Fdg. VI, R. 38].

On May 21, 1951, petitioners filed this action in the State courts for declaratory relief, alleging two causes of action [R. 7-28]. The first challenged the constitutionality of Section 10 of the zoning ordinance as depriving petitioners of their property without due process of law and denying to them the equal protection of the laws under both the Federal and State Constitutions. The second challenged the validity of said ordinance on the further ground that the respondent City, the mayor and the members of its legislative body had conceived a scheme or plan of action designed and intended to keep petitioners' property unimproved so that it could be used by the public for park purposes and to depreciate the value of petitioners' property in order that it could be acquired for park purposes in eminent domain proceedings at the lowest possible price (see Br., Point 3, *post*, p. 32).

Respondent filed an answer to the first cause of action [R. 29-33] and later a separate answer to the second cause of action [R. 33-35]. In the answers the enactment of the zoning ordinance and the adoption of the resolution were admitted, but generally the other material allegations of each cause of action were denied.

The case was tried to the court without a jury. The uncontradicted evidence showed the facts as we have recited them above. Although the zoning ordinance prohibits the construction of any houses on petitioners' prop-

erty, the uncontradicted evidence showed that the Building Code of respondent City requires that houses built on petitioners' property must be constructed on pilings [R. 271-273]. The trial court held that the zoning ordinance was constitutional because:

> (a) residences if constructed on petitioners' property would have to be erected on pilings and that reasonable minds might differ as to the safety of residences so constructed [Fdg. II, R. 37]; and
>
> (b) the construction of such houses on pilings might create police problems by reason of the possible use of the area underneath thereof for immoral purposes [Fdg. II, R. 37].

For eighteen years prior to the adoption of the challenged ordinance, petitioners' property was zoned for residence purposes. No change of conditions upon petitioners' property nor in adjacent areas was shown to have occurred during this eighteen-year period or after the adoption of said zoning ordinance up to the time of trial that made petitioners' property unsuited for residential purposes and suited only for beach recreational purposes. On the contrary, the uncontradicted evidence showed that from 1935 to 1946 due to the addition of some forty to fifty-seven feet of accretions [R. 212, 214, 215] to petitioners' property it became better adapted to residential use. The trial court found "that reasonable minds might reasonably differ" as to whether or not petitioners' property was suitable for either residential or commercial development [Fdg. IX, R. 39].

From the time of the enactment of the ordinance in 1941, denying petitioners the right to use their property for residence purposes, the city and county ad valorem tax on the property was increased from $4,264.00 in 1941 to $8,947.00 in 1950 [Ex. 50]. However, during this period when the petitioners paid $50,137.00 in city and county taxes [Ex. 50] they obtained no revenue from the property [R. 310].

The trial court concluded [R. 40] and adjudged [R. 43] that the challenged ordinance did not deprive petitioners of their property without due process of law.

The trial court during the course of the trial expressly stated that the motive of the City in adopting Ordinance No. 502 was immaterial [R. 118, 123-125] nevertheless the Court made findings that the motives were not wrongful [Fdg. VII, R. 38-39; Fdg. XII, R. 40].

Petitioners' appeal to the Supreme Court of California was transferred to the State District Court of Appeal which unanimously reversed the judgment (*McCarthy v. City of Manhattan Beach*, 257 P. 2d 679) [R. 346], holding that Section 10 of said ordinance

> "* * * is confiscatory and constitutes a taking of plaintiffs' property for public use without compensation and without due process of law. * * * said section * * * is unconstitutional and invalid." (257 P. 2d 690.) [R. 365.]

Upon petition for rehearing, the District Court of Appeal unanimously denied the petition [R. 365].

The Supreme Court of California subsequently granted a hearing and by a divided court affirmed the judgment of the trial court (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879) [R. 367]. The Chief Justice did not participate. Three justices joining in one opinion stated that said Section 10 of the zoning ordinance was "a fair, just and reasonable regulation for the general welfare of the city" [R. 382]. In said three justices' opinion it was held that the trial court properly disregarded petitioners' contention that said zoning ordinance was not adopted in good faith.[2] One justice wrote a separate opinion, concurring in the judgment [R. 382]. Two justices dissented and adopted the opinion of the District Court of Appeal [R. 385]. Indeed, one of the dissenting justices of the State Supreme Court stated:

> "Taking the property as is here done does not appear to me to be encompassed within a reasonable exercise of the police power * * *; *it smacks more of calculated and arbitrary confiscation by a police state.* Besides all that, I should like to think that the scheme here resorted to was beneath the honor of a self-respecting American municipality." (41 Cal. 2d 879, 900.) [R. 387.]

Petitioners' petition for rehearing in the State Supreme Court was denied, two justices dissenting [R. 387].

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[2]*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 893 [R. 379].

B.

Statements Disclosing Basis of Jurisdiction.

1. Jurisdiction of this court is invoked under Section 1257 of Title 28, United States Code. The judgment or decree sought to be reviewed is a final judgment of the Supreme Court of the State of California which is the highest court in this state in which a decision in said case could be had.

2. The statute of the state, the validity of which is involved, is Section 10 of Ordinance No. 502 of respondent City [Ex. 1 to Comp.; R. 20A-20C; Appendix, p. 1] purportedly adopted pursuant to The Planning Act [Calif. Stat. 1929, Chap. 838, and acts amendatory thereof and supplementary thereto in effect on June 26, 1941; Deering's California Gen. Laws, Act. 5211b].

3. The decision of the Supreme Court of California was filed on December 30, 1953 [R. 367]; petition for rehearing, timely filed, was denied January 27, 1954 [R. 387]. Mr. Justice Douglas, pursuant to application of petitioners, extended the time of petitioners to file a petition for writ of certiorari herein to and including May 27, 1954 [R. 393].

4. The nature of the case has been stated (*ante,* pp. 2 to 9). Petitioners in their complaint challenged the validity of Section 10 of said zoning ordinance on the ground that it deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment [R. 16], and denied to petitioners the equal protection of the laws in violation and contravention of Section 1 of the Fourteenth Amendment [R. 17]. These constitutional guarantees were asserted and urged in the trial court and at all stages of the appeal in the appellate courts of California (*McCarthy v. City of*

Manhattan Beach, 41 Cal. 2d 879, 882 [R. 367]). The trial court and the Supreme Court of California held these constitutional guarantees did not protect petitioners [R. 382].

5. The following cases are believed to sustain jurisdiction:

Yick Wo v. Hopkins, 118 U. S. 356;

Dobbins v. Los Angeles, 195 U. S. 223;

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393;

Seattle Trust Co. v. Roberge, 278 U. S. 116.

C.
Questions Presented.

Broadly stated the questions presented are:

Did said Section 10 of respondent's zoning ordinance deprive petitioners of their property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States?

Does said Section 10 deny to petitioners the equal protection of the laws?

Stated more specifically:

1. Did said Section 10 by limiting the use of petitioners' property:

(a) to beach recreational purposes; and

(b) to the erection thereon of fences, small signs and lifeguard towers;

amount to a taking of said property for public use without compensation?

2. Is there "substantial support"[3] in the evidence for the determination of the courts below that said Section

[3] *Truax v. Corrigan,* 257 U. S. 312, 324.

10 has such relationship to public health, public morals, public safety and general welfare as to be a proper exercise of the police power?

3. Does respondent's zoning ordinance by restricting the use of petitioners' property to playground purposes, while permitting stores, single and multiple family residences or other useful structures to be erected on all other privately owned land in respondent City, deny to petitioners the equal protection of the laws?

4. Are petitioners further denied the equal protection of the laws by the determination of the courts below that said Section 10 is a legitimate exercise of the police power because if the construction of residences on pilings on petitioners' property was permitted, the area underneath such residences might possibly be used for immoral purposes, although such ordinance permits structures, equally available for immoral purposes, in all other portions of said City?

5. Where there was uncontradicted documentary evidence that the motives of respondent City in enacting said Section 10 were:

(a) to depress the value of petitioners' property so that eventually it could be acquired for recreational purposes at such depressed value in condemnation proceedings; and

(b) to limit the use of the property to public recreational purposes (knowing that petitioners could not effectively enclose it) during the interval between adoption of the ordinance and acquisition in condemnation proceedings;

were the courts below correct in ruling that such motives must be disregarded regardless of the indicia of fraud shown?

D.

Reasons Relied on for Allowance of Writ.

1. The Supreme Court of California has decided a federal question of substance not heretofore determined by this court, namely, that a city, under the guise of the police power, may limit the use of private property by zoning ordinance to only playground purposes and prohibit the erection of any structures thereon other than fences, lifeguard towers and small signs.

2. The Supreme Court of California has decided a federal question of substance in a way probably not in accord with applicable decisions of this court and of the courts of other states.[4]

3. The Supreme Court of California has held valid as a proper exercise of the police power a municipal zoning ordinance which, so far as we have discovered, is more restrictive as to use and structures than any other ordinance heretofore upheld by any court. It did so upon findings without substantial support.

4. Under any view of the evidence, the Supreme Court of California has held valid a zoning ordinance which clearly went beyond the necessities of the case.

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[4]*Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393; *Panhandle Eastern Pipeline Co. v. State Highway Commission,* 294 U. S. 613, 621; *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 121; *Eaton v. Sweeny,* 257 N. Y. 176, 177 N. E. 412, 414; *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 232, 15 N. E. 2d 587, 591; *Householder v. Town of Grand Island,* 114 N. Y. S. 2d 852, 855; *Scholl v. Borough of Yeadon,* 148 P. Super. 601, 26 A. 2d 135, 137.

5. The decision of the Supreme Court of California that the motives of a municipality in enacting an ordinance are immaterial, conflict with the conclusions reached by this court and with the decisions of the highest courts of other states.[5]

If a city may validly zone private property for the limited use and improvement provided by Section 10 of the zoning ordinance in question, all unimproved property bordering a body of water and adaptable for recreation purposes may be so restricted. Certainly this will be the rule in California unless corrected by this court. Moreover, it will tend to become a precedent throughout the United States. Such a restriction goes beyond an *actual taking* in that it

> "* * * leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden."
>
> Lehman, J., in *Arverne Bay Const. Co. v. Thatcher,* 278 N. Y. 222, 232, 15 N. E. 2d 587, 592.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court directed to the Supreme Court of California to the end that this cause may be reviewed and determined by this court as provided by the Statutes of the United States, that the

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[5]*Dobbins v. City of Los Angeles,* 195 U. S. 223, 240; *cf. Grand River Dam Authority v. Grand-Hydro,* 335 U. S. 368, 369; *State v. Cincinnati Gas-Light Co.,* 18 Ohio St. 262, 301-302; *Grand Trunk Western R. Co. v. City of Detroit,* 326 Mich. 387, 40 N. E. 2d 195.

judgment or decree herein of said Supreme Court of California be reversed by this court, and for such other and further relief as to this court may seem proper.

Dated: May 13, 1954.

Respectfully submitted,

T. B. COSGROVE,
JOHN N. CRAMER,
LEONARD A. DIETHER,
Counsel for Petitioners.

J. D. BARNUM, JR.,
Of Counsel.

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Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation.

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

SUPREME COURT OF CALIFORNIA:

The opinions of the four justices of the Supreme Court of California joining in an affirmance of the judgment of the trial court are reported in 41 Cal. 2d 879, 882, 896, 264 P. 2d 932, 933, 941 [R. 367, 382]. The dissenting opinions are reported in 41 Cal. 2d 879, 898, 900, 264 P. 2d 932, 943, 944 [R. 385].

THE DISTRICT COURT OF APPEAL OF CALIFORNIA:

The unanimous opinion reversing the judgment of the trial court is reported in 257 P. 2d 679 [R. 346].

II.
JURISDICTION.

The basis of jurisdiction is given under heading "B" in Petition for Writ of Certiorari (*ante,* p. 10) and in interest of brevity is incorporated here by reference.

III.
STATEMENT OF THE CASE.

A Summary Statement of the Case appears under heading "A" in the Petition for Writ of Certiorari (*ante,* pp. 2 to 9) and in the interest of brevity is incorporated here by reference. Said statement is amplified in the Argument (*post,* pp. 25-26, 28-30, 32-35).

IV.
SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In holding that Section 10 of respondent's zoning ordinance does not effect a taking of petitioners' property for public use without compensation and therefore does not violate the due process clause of the Fourteenth Amendment to the Constitution.

2. In holding that said Section 10 does not violate the due process clause of the Fourteenth Amendment of the Constitution because it has such relationship to public health, public morals, public safety and the general welfare as to be a proper exercise of the police power.

3. In holding that the restriction of petitioners' property to uses for playground purposes (not applicable to any other privately owned property in the city) does not deny to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

4. In extending the nuisance rule applicable to billboards, announced in *Cusack Co. v. City of Chicago*, 242 U. S. 526, to petitioners' property as justification for the ordinance prohibiting the construction of residences.

5. In holding that evidence of the motives of respondent City in enacting Section 10 were properly disregarded by the trial court although the motives were in furtherance of a plan or scheme designed and intended to depress the value of petitioners' property and thereafter to obtain said property at such depressed value in eminent domain proceedings and to limit the use of the property to public recreational purposes during the interval between the adoption of the ordinance and its acquisition in condemnation proceedings.

6. In holding that said Section 10 was a reasonable regulation for the general welfare of respondent City.

V.

ARGUMENT.

Summary of Argument.

Point 1. By limiting unreasonably the use of petitioners' property, respondent City's zoning ordinance deprives petitioners of a substantial right therein without compensation in violation of the due process clause of the Fourteenth Amendment.

Point 2. Section 10 of said ordinance cannot be justified under the police power.

Point 3. Uncontradicted documentary evidence shows that the motives of respondent City in enacting said zoning ordinance was wrongful. The holding of the Supreme Court of California that such motives were immaterial conflicts with the rulings of this court.

POINT 1.

By Limiting Unreasonably the Use of Petitioners' Property, Respondent City's Zoning Ordinance Deprives Petitioners of a Substantial Right Therein Without Compensation in Violation of the Due Process Clause of the Fourteenth Amendment.

As pointed out in the Summary Statement of the Case, petitioners' property was zoned for residential purposes for a period of eighteen years immediately prior to the adoption of said zoning ordinance in 1941 [Exs. 14 and 15]. The trial court found that reasonable minds might differ as to whether petitioners' property is or was suitable for residential development [Fdg. IX, R. 39]. There was no evidence that at the time of the adoption of the ordinance or at any time subsequent thereto petitioners' property was not suited or adapted for residential purposes; further, the trial court rejected petitioners' offer to prove that it could be so developed [R. 238].

Respondent City, by a quiet title action, clouded the title to the property in question from 1925 to 1938 [*Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653, 76 P. 2d 483; Ex. 6]. When the City's claim was adjudged to be without merit, it sought the aid of the County and the State to acquire petitioners' property for public purposes while the property was still unimproved in order that the public could use the same as a public beach [Exs. 20, 21, 23, 25, 26, 29, 39, 40]. When the City's efforts to acquire the property through the County and State authorities failed, the City adopted said zoning ordinance restricting the use of petitioners' property to playground purposes [Ex. 1 to Comp.; R. 20A-20C]. Petitioners' property and the former electric railway right of way were the only parcels of private property included in the

beach recreation district or zone [Ex. 1 to Comp. (see original certified record)]. At that time there was a public beach on the north and south of petitioners' property [R. 258; Ex. 12]. Said former right of way contiguous to petitioners' property on the east has been acquired since by the state for park purposes [Par. VI, Comp., R. 12; and Par. V, Ans., R. 31].

The limitation placed on the use of petitioners' property deprives it of any reasonable or profitable use. The respondent's City Council adopted the ordinance which authorized petitioners to charge admission to their property [Sec. 10, Ex. 1 to Comp., R. 20B, Appendix p. 1], knowing petitioners had been unable to maintain a fence around it [R. 131; Ex. 37]. It also authorized petitioners to rent certain beach equipment but denied to petitioners the right to construct thereon any improvements which would enable them to take advantage of the very limited use permitted [Sec. 10, Ex. 1 to Comp., R. 20B; quoted Appendix, *post,* p. 1]. The fact that petitioners are prohibited from constructing restrooms, dressing rooms or any buildings in which to exhibit or store equipment to be rented, together with the adidtional facts that petitioners are denied the privilege of maintaining a parking lot for automobiles or any structure for the sale of food or soft drinks, in and of itself makes said Section 10 arbitrary and oppressive, aside from other grounds of invalidity.

In 7 MacQuillan on Municipal Corporations, 3rd Ed. 490, par. 24.505, the author says:

> "Prohibition of buildings as distinguished from their regulation cannot be ordained by the state or a municipal corporation unless the prohibited building

is *per se* dangerous to public health and safety * * *."

There is no evidence in the record that buildings if constructed on petitioners' property would be *per se* dangerous to public health and safety.

Petitioners' property was zoned for residential purposes from 1923 to 1941 [Exs. 14 and 15]. There was no showing that during said period or subsequently there was any change in the character of petitioners' property or of the neighborhood surrounding petitioners' property, nor was there any evidence of error or mistake in the original zoning for residential purposes. (See *Zang & Sons Builders, Inc. v. Taylor* (Md.), 102 A. 2d 723, 726, 727.)

For many years prior to the adoption of said ordinance, the property to the east of said former right of way has been improved and used for commercial, residential or multiple family residences [R. 236, 237, 306-307; Ex. 3]. South of petitioners' property in the contiguous City of Hermosa Beach residences have been constructed and maintained for more than thirty years on property located with respect to the ocean, similarly to petitioners' property [R. 151]. No evidence of damage from the ocean was shown to have occurred to said residences in Hermosa Beach. The two pictures appearing as a frontispiece of the petition show the location of said residences in Hermosa Beach with relation to petitioners' property [Exs. 2, 18, 54, 55].

Said Section 10 clearly deprives petitioners of substantial rights in their property without due process of law in violation of the Fourteenth Amendment.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393;

Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613, 621;

Seattle Trust Co. v. Roberge, 278 U. S. 116, 121;

Eaton v. Sweeny, 257 N. Y. 176, 177 N. E. 412, 414;

Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587, 591;

Householder v. Town of Grand Island, 114 N. Y. S. 2d 852, 855;

Scholl v. Borough of Yeadon, 148 Pa. Super. 601, 26 A. 2d 135, 137.

As was stated in the case of *Seattle Trust Co. v. Roberge, supra,* 278 U. S. 116, 121, the right of the owner of land "to devote its land to any legitimate use is properly within the protection of the Constitution."

The Court of Appeals of New York very aptly stated in *Arverne Bay Const. Co. v. Thatcher, supra,* 278 N. Y. 222, 15 N. E. 2d 587, 589:

> "Legislative power of the state is, however, not plenary but is limited by the Constitution of the United States and by the Constitution of the state. It may not take private property without compensation ever for a public purpose and to advance the general welfare."

This court in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U. S. 393, 413, referring to the right of the govern-

ment to diminish the values incident to property and the implied limitation in this regard, said:

> "But obviously the implied limitation must have its limit, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." (260 U. S. 413.)

In the case at bar the limitation of use placed upon petitioners' property is of such a magnitude that it may be exercised by respondent City only by purchase or eminent domain and the payment of compensation therefore. Otherwise, petitioners' property has been taken without due process of law in violation of the Fourteenth Amendment.

POINT 2.

Section 10 of Said Ordinance Cannot Be Justified Under the Police Power.

The trial court found that reasonable minds might differ as to the safety of residences constructed on pilings on petitioners' property and that such residences might create police problems by reason of possible uses of the areas underneath such residences for immoral purposes [Fdg. II, R. 37].

The trial court concluded and adjudged that Section 10 of the zoning ordinance was enacted

> "for the promotion of public morals, public safety and general welfare of said city * * *" [Con. V, R. 41; Judgment 5, R. 43].

The trial court's judgment was affirmed by the State Supreme Court.

We believe there is no substantial support in the evidence for these findings.

It is well settled that:

> "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611." (Taft, C. J., in *Truax v. Corrigan, supra*, 257 U. S. 312, 324-325.)

We will now demonstrate not only that the findings referred to are "without substantial support" but also that neither the evidence nor the findings support the conclusions or the judgment.

A. Public Safety of Residences Constructed on Pilings on Petitioners' Property.

The evidence is overwhelming to the effect that residences could be safely constructed on petitioners' property. An expert witness called by petitioners (his qualifications were conceded by respondent City [R. 157-158]),

testified that the construction of residences on petitioners' property would be "feasible and practicable" [R. 202] and "would be perfectly safe" [R. 222]. Respondent City offered no testimony to the contrary.

Respondent City conceded that its Building Code required that residences constructed on petitioners' property must be constructed on pilings, although the zoning ordinance prohibited such residences [R. 272-273].

Respondent offered testimony that in time of heavy storm with a high tide, waves had been seen to break at approximately the wheel marks on Exhibit 1 (Frontispiece) and, at several locations on petitioners' property the water came up to the westerly edge of the electric railway right of way [R. 267-268, 297, 298]. The uncontradicted testimony of petitioners' expert was that houses constructed on pilings on petitioners' property as required by respondent City's building code [R. 273-274] would be unaffected by such storms and that since the beach would be simply gouged out and quickly restored by ocean forces, the houses would stand perfectly safe [R. 222].

Said expert witness, in the course of his direct examination, used a schematic drawing to illustrate the approximate location where residences could be constructed on petitioners' property. Said drawing was introduced in evidence as Exhibit 62. On cross-examination said expert was asked this question:

> "Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62?" [R. 231]

and he replied:

> "Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible." [R. 231.][1]

Even a cursory examination of the testimony of said witness clearly shows that in said reply he was not referring to the safety of houses constructed on pilings but only with respect to the details thereof. There is no other evidence in the record as to whether reasonable minds might differ as to the safety of houses constructed on piling on petitioners' property other than the statement of the trial judge after viewing the premises upon stipulation of the parties. The trial judge admitted he was not an expert [R. 329], but concluded:

> "* * * unless these houses were protected on the seaward side by an adequate sea wall, [they] would be subject to a constant hazard of destruction by the sea." [R. 321.]

And further concluded that this was a question

> "* * * upon which reasonable minds might differ." [R. 327.]

In 1950 petitioners challenged the validity of said zoning ordinance as it applied to their property and applied for a change of zone from Beach Recreation to Residence.

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[1]The word "Yes" in said reply was not in the reporter's transcript when first prepared. It was inserted by the trial court on proceedings for correction thereof, which are shown in the Record, pages 343-345.

Petitioners' said application was denied by the Planning Commission of respondent City upon grounds *other than* public safety or public morals [Ex. 49].[2]

The City Council of respondent City approved the findings of said Planning Commission and likewise denied said application [Resolution No. 1551, Ex. 3 to the Comp., R. 21-28; Fdg. VI, R. 38].

At the trial, respondent City endeavored to justify the zoning of petitioners' property for Beach Recreation by the testimony of two witnesses, Clifford G. Petrie, City Manager of respondent, and Tom C. Cook, a zoning expert of the County of Los Angeles. The trial court ruled that both witnesses had qualified as zoning experts. Said witnesses (who were the only zoning experts called by respondent) attempted to justify the zoning of petitioners' property on grounds *other than* public safety or public morals. Petrie, testified that in his opinion petitioners' property was properly zoned for Beach Recreation because:

> "It is ocean frontage, being a natural resource or asset to the community, and those who developed and planned the community strived to take advantage of that asset, that natural resource, by so locating the structural developments sufficiently far enough from the water to permit beach use, to permit a fine view, and to erect a promenade * * *. In my opinion, that was good planning and proper reason for the type of classification used, the community

---

[2]The Planning Commission found that the granting of the application

> "* * * would be contrary to public interests, would depreciate the value of surrounding property, is not demanded by any public necessity, convenience or general welfare and [would] be contrary to good zoning practice" [Ex. 49, p. 2, lines 8-11]

taking advantage of its natural resource, natural asset, to the best of its ability." [R. 290.]

Cook, the county zoning expert, the author of Section 10 and the originator of the Beach Recreational Zone concept [R. 252-253] testified in substance that he considered that petitioners' property was properly classified as beach recreation because it was (a) "eminently suited for it," (b) "was being so used," (c) "recreation beaches are a common feature in beach cities," (d) the cost of building "small homes" would necessarily be high, (e) residential development of petitioners' property would destroy certain values which the "properties very close to the ocean front had long enjoyed," and (f) would give the owner *"the right to derive an income from it"* [R. 306-307].

Such testimony not only shows that said Section 10 has no real, substantial relation to public safety or public morals but also shows there was no real or valid basis for classifying petitioners' property as "Beach Recreation." And in so doing it denies to petitioners the equal protection clause of the Fourteenth Amendment.

B. Construction of Residences on Pilings on Petitioners' Property Would Not Affect Public Morals.

Only one witness, Henry G. Sights, the chief of police of respondent, testified on the question of the relation between said Section 10 and public morals. Over the objections of petitioners [R. 296] he was permitted to express the opinion that the construction of houses on pilings would cause,

> "a police problem * * * with juveniles, sex perverts; * * *." [R. 296-297.]

Sights admitted on cross-examination that he was not familiar with houses on pilings except in Santa Monica and through that district and *was not familiar with the police problems there* [R. 301]. It clearly appears that said Section 10 denied to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Every improvement or cover on private property in respondent City might possibly be used for immoral purposes. If said Section 10 is sustained on the ground of public morals it clearly applies one rule to residences on petitioners' property and another to residences, buildings and other structures elsewhere in respondent City.

This Court, quoting from *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, said in *Dobbins v. Los Angeles*, 195 U. S. 223, 237:

> "'The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Sinnot v. Davenport*, 22 How. 227, 243; *Missouri, Kansas & Texas Ry. v. Haber*, 169 U. S. 613, 626.'"

C. The Police Power Is Subordinate to Constitutional Limitations.

This court has stated that the exercise of the police power,

> "must be exercised within a limited ambit and is subordinate to Constitution limitations * * *. Under it there is no unrestricted authority to accomplish whatever the public may presently desire." (*Panhandle Eastern Pipeline Co. v. State Highway Commission,* 229 U. S. 612, 622.)

And the police power:

> "has its limits and must stop when it encounters the prohibitions of the Constitution." (*Eubank v. Richmond,* 226 U. S. 137, 142.)

This court has further stated that if the means employed by a city in exercising the police power,

> "have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of the rights injuriously affected by such illegal action." (*C. B. & Q. Ry. v. Drainage Commissioner,* 200 U. S. 561, 593.)

We submit there is no substantial support in the evidence for the conclusion of the court that the legislative body of respondent City adopted said section for the promotion of public safety, public morals and general welfare, but on the contrary the evidence shows that said Section 10 has no real, substantial relation to public safety, public morals or general welfare.

POINT 3.

The Evidence Shows That the Motives of Respondent City in Enacting Said Zoning Ordinance Were Wrongful. The Holding of the Supreme Court of California That Such Motives Were Immaterial Is Erroneous and Conflicts With the Rulings of This Court.

As pointed out in the Summary Statement of the Case, petitioners' second cause of action challenged the validity of Section 10 of the zoning ordinance for violating the guarantees of the Fourteenth Amendment because it was enacted pursuant to a scheme or plan designed and intended:

1. To keep petitioners' property unimproved so that it could be used by the public as a beach recreational area [R. 18].

2. To depreciate the value of petitioners' property so that a governmental agency could acquire the property by eminent domain proceedings for park purposes at the lowest possible amount of money [R. 18].

The evidence clearly shows that respondent City in enacting said ordinance did so pursuant to a wrongful motive. There was no evidence to the contrary.

The evidence shows, in brief, the following:

1. Respondent City claimed from 1924 to 1938 that petitioners' property had been dedicated to a public use (*City of Manhattan Beach v. Cortelyou,* 10 Cal. 2d 653).

2. In March, 1938, after the decision in the *Cortelyou* case holding that there had been no such dedication, the

City Council adopted a resolution requesting the County and the State to acquire petitioners' property for a public beach, and that petitioners' property "should be acquired by the public for the continued use as a public beach and particularly more at a time when no buildings or structures of any kind have been erected thereon" [Ex. 20].

3. In July, 1938, the mayor and the city attorney of respondent City informed petitioners that the City desired to acquire their property for a public beach and they didn't want petitioners "to sell it or to improve it because to do so would increase its value and they would like to get it within their means if they could" [R. 100].

4. In January, 1939, the City Council directed the city attorney to request petitioners to submit a basis for acquisition of their property [Exs. 22 and 23].

5. In July, 1939, the City Council of respondent City directed the city attorney to communicate with the Governor of the State in an effort to secure assistance in acquiring petitioners' property and, pursuant to such direction, the city attorney, in his communication to the Governor, informed him that petitioners proposed to sell their property and stated "if this is done the cost of acquisition would undoubtedly be materially increased as the property at the present time is not improved" [Ex. 26].

6. In June, 1940, petitioners informed the City Council they were "arranging to sell such portions of their property as could be sold this summer" [Ex. 33].

7. In July, 1940, petitioners sought to enclose their property with a smooth wire fence [Ex. 36; R. 131] which was subsequently so badly damaged by the public

it had to be removed [R. 322]. This fact was made known to the City Council [Ex. 37].[3]

8. In August, 1940, the city clerk was directed by the City Council to answer a letter to it from a resident of respondent City inquiring as to why the property in question was not a public beach and referred to the fence attempted to be constructed by petitioners [Exs. 39 and 40]. The city clerk, pursuant to such direction, answered said inquiry and stated in part:

> "The City Council desires to convey to you and all others interested in this city *that everything possible is being done to whip this thing into the right order of things which means when this matter is finally settled it will be in the hands of the State Park and Playground Department for the use of the public without end*" [Ex. 40].

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[3]Although this exhibit was marked only for identification, the Supreme Court of California assumed that it was in evidence (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 896). Said Exhibit 37 reads as follows:

"July 30, 1940.

City Council of Manhattan Beach
Manhattan Beach
California

Gentlemen:

I am building a fence on my property along the ocean front extending each side of Center Street at Manhattan Beach. Mobs have already destroyed part of my property consisting of fencing materials and threatened to inflict further damage.

I demand that you protect my property from damage and you are notified that I expect to hold the City of Manhattan Beach liable for all damage that I may suffer.

Very truly yours,

ELB EJT
CC Clyde Woodworth
City Attorney, Manhattan Beach"

(This letter was signed by Petitioner Neil S. McCarthy [R. 111, 131].)

9. In June, 1941, the City Council adopted the zoning ordinance in question [Ex. 1 to Comp.; R. 20A-20C].

The trial court considered the motives of respondent City in enacting said ordinance immaterial [R. 118] but, nevertheless, found against petitioners on each of the contentions alleged [Fdg. VII, R. 38-39]. We submit that the findings of the trial court that the motives of the City Council were not wrongful have no support in the evidence.

The Supreme Court of California also concluded that the motives of the legislative body in enacting said zoning ordinance were immaterial (*McCarthy v. City of Manhattan Beach,* 41 Cal. 2d 879, 893) [R. 379].

The courts have clearly held that a zoning ordinance enacted for the purpose of depressing the value of certain property in order to enable the public authorities to obtain that property by condemnation at a reduced price is unconstitutional and void.

Grand River Dam Authority v. Grand-Hydro, 200 Okla. 157, 201 P. 2d 225, aff'd 335 U. S. 359;

State ex rel. Tingley v. Gurda, 209 Wisc. 63, 243 N. W. 317;

Grand Trunk Western R. Co. v. City of Detroit, 326 Mich. 387, 40 N. W. 2d 195;

Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10;

State v. The Cincinnati Gas, Light & Coke Company, 18 Ohio St. 262, 301-302.

In *Dobbins v. Los Angeles, supra,* 195 U. S. 223, this Court in reversing a judgment of the Supreme Court of California which had held valid an ordinance zoning cer-

tain property against the erection of a gas plant, held that:

> "* * * where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual, the courts *may consider and give weight to such purpose in considering the validity of the ordinance.*" (195 U. S. 240.)

After citing the case of *Yick Wo v. Hopkins, supra,* 118 U. S. 356, this Court asked a rhetorical question suggesting a negative answer, namely, whether it could be successfully maintained that

> "the council could arbitrarily, and *with a view of compelling the sale of the works to the municipality* or a rival company fix the return at a price below the cost of gas to the producer and at such a rate as to be ruinous to the business?" (195 U. S. 240.)

The case at bar gives rise to an analogous question which requires a negative answer: May respondent City of Manhattan Beach arbitrarily limit the use of petitioners' property and the structures that may be erected thereon, for the purpose of depreciating the value of petitioners' property and enabling it to be acquired in condemnation proceedings at an unreasonably low price?

In *State v. Cincinnati Gas-Light & Coke Co., supra,* 18 Ohio St. 262, the Supreme Court of Ohio declared:

> "Both public and private rights are to be protected, and for that purpose we must recognize the fact that a municipal as well as a private corporation can do wrong." (18 Ohio St. 302.)

This case has been cited with approval and followed by this Court in *Yick Wo v. Hopkins, supra,* 118 U. S.

356, 371 (reversing 68 Cal. 294), and *Dobbins v. City of Los Angeles, supra,* 195 U. S. 223, 240 (reversing 139 Cal. 179).

We submit that the evidence establishes beyond question that the motives of the legislative body of respondent City in enacting said Section 10 were wrongful and that Section 10 is oppressive and discriminates against petitioners. Under such circumstances, the trial court should have considered and given weight to such wrongful motives in determining the validity of said zoning ordinance.

CONCLUSION.

The trial court and the Supreme Court of California did not heed the warning of this Court in *Pennsylvania Coal Co. v. Mahon, supra,* 260 U. S. 393, 416:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (260 U. S. 416.)

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated: May 13, 1954.

Respectfully submitted,

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APPENDIX A.

Section 10 of Zoning Ordinance No. 502 of Respondent City of Manhattan Beach.

[Ex. 1 to Comp. R. 20B.]

SECTION 10. B-1 BEACH RECREATION DISTRICT

A. Land Uses Permitted

1—The following beach recreation activities: swimming, surf-fishing and athletics including operation of beach facilities for the above activities for an admission fee;

2—Rental of the following beach equipment: backrests, chairs, benches, picnic tables and stoves, umbrellas, wind screens; surf-rafts, surf-boards, surfing bags, paddle-boards, kayaks, canoes, and other small boats.

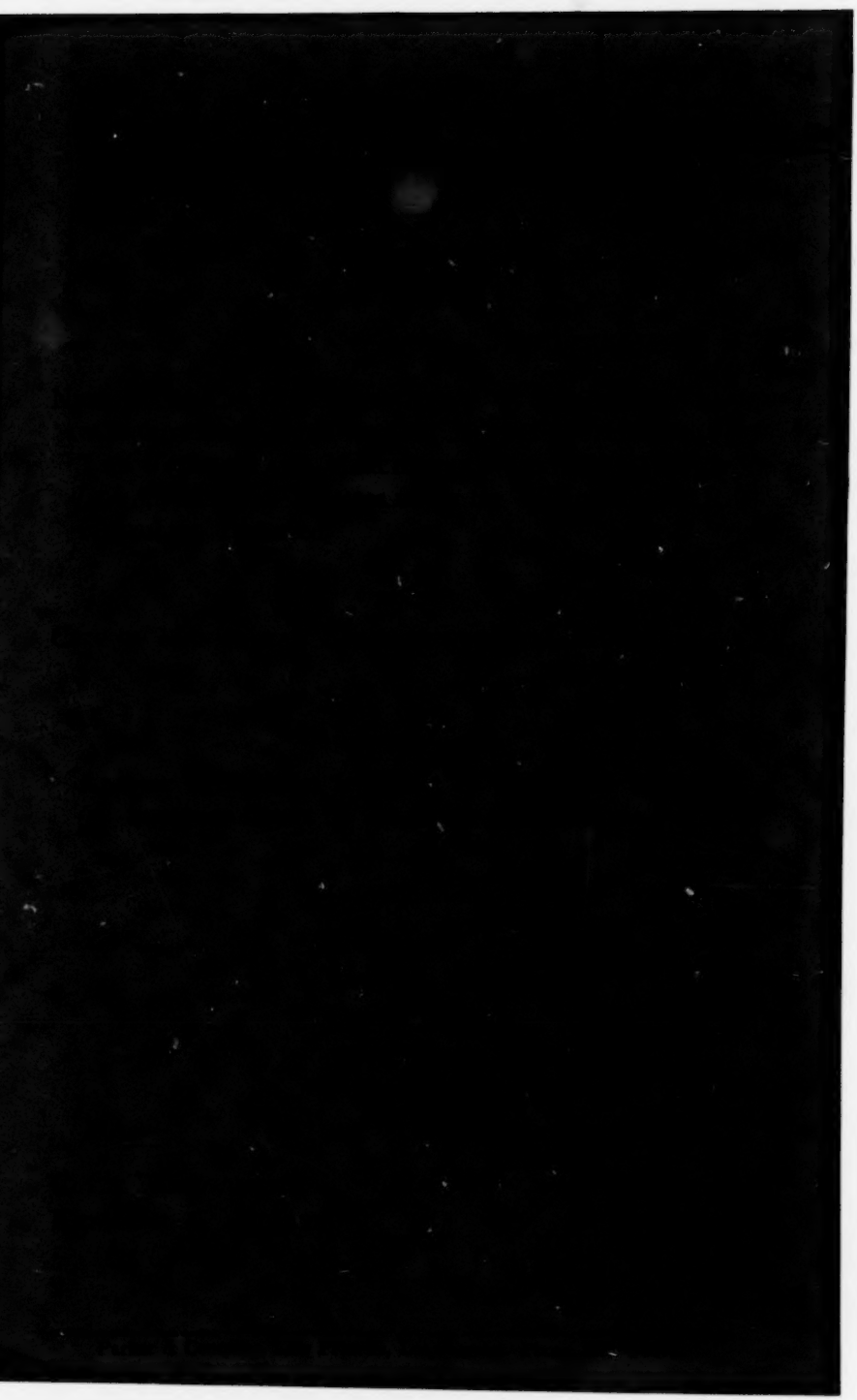
B. Other Uses

No use other than those specifically mentioned in this section as permitted uses or those determined by action of the Commission, in accordance with Paragraph 1 of Sub-section A of Section 15 of this Ordinance to be not more obnoxious or detrimental to the welfare of the community, shall be permitted; nor shall said Commission by such action determine that the following and similar uses are deemed to be uses permitted in the B-1 District; residences, camps, trailer camps, garages, automobile parking lots, theatres, dance halls, shooting galleries, skating rinks, bowling alleys, roller coasters, merry-go-rounds, restaurants, cafes and saloons.

C. Structures Permitted

1—No buildings, structures walls, or fences shall be erected in the B-1 District except life guard towers and open smooth wire fences neither of which shall have a height greater than four (4) feet above the grade of the nearest portion of the strand.

2—No sign shall be permitted or displayed in the B-1 District other than directional signs as specified below and one unlighted sign not exceeding four (4) square feet in area attached to each entrance gate to the property. No lights visible from the landward side shall be used to outline or otherwise decorate any such structure as is permitted. No flood lights shall be used except to illuminate active play areas in which case such lights shall be so shielded or arranged that they do not throw their light landward of the landward boundary of said District. Lighted directional signs, each not to exceed one (1) square foot in area, may be used to direct occupants of the beach to rest rooms, life-guard and first-aid stations and exits provided they are so arranged or shielded as not to throw their light landward of the landward boundary of the District.



SUBJECT INDEX

PAGE

Amplification of summary statement of the case 2

Argument 9

Summary of argument 9

Point I. The ordinance does not violate the due process clause of the Fourteenth Amendment 8

Point II. Section 10 of the ordinance is a proper exercise of the police power 11

A. Safety of residences constructed on pilings and suitability of subject property for residential development 12

B. The construction of residences on pilings tends to create police problems and adversely affects public morals 15

Point III. Motive or purpose of respondent in enacting the ordinance in question 17

A. No improper motives or purposes actuated respondent in enacting the ordinance in question 17

B. The motives of the legislative body in enacting an ordinance are immaterial to its validity 19

Point IV. General zoning principles applicable to the case at bar 21

Conclusion 23

TABLE OF AUTHORITIES CITED

Cases

	PAGE
California Auto Assn. v. Maloney, 341 U. S. 105	10
City of Miami Beach v. Hogan, 63 So. 2d 493; cert. den., 346 U. S. 891	22
Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P. 2d 439	21
Cusack Co. v. City of Chicago, 242 U. S. 526	16
Detroit United Railway v. Detroit, 255 U. S. 171	20
Dobbins v. Los Angeles, 195 U. S. 223	20
Euclid v. Ambler Realty Co., 272 U. S. 365	9, 21
Fenner, et al. v. City of Muskegon, 331 Mich. 732, 50 N. W. 2d 210	22
Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P. 2d 38; cert. den., 337 U. S. 939	21
Long v. City of Highland Park, 329 Mich. 146, 45 N. W. 2d 10	10
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	10
Safeway Stores v. City Council, San Mateo, 86 Cal. App. 2d 277, 194 P. 2d 720	19
Standard Oil Co. v. Marysville, 279 U. S. 582	21
Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P. 2d 672	19
Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 171 P. 2d 542	21
Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388; aff'd, 274 U. S. 325	10, 21

Statutes

California Government Code, Sec. 50140	19
California Government Code, Sec. 50141	19

IN THE

Supreme Court of the United States

No. 765

October Term 1953

NEIL S. MCCARTHY, MARGUERITE G. MCCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of RALPH R. HUESMAN, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Answer to Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, City of Manhattan Beach, herein files its answer to the petition of Neil S. McCarthy, *et al.*, for Writ of Certiorari to the Supreme Court of the State of California.

Amplification of Summary Statement of the Case.

Respondent submits that the following material facts do not appear in petitioners' Summary Statement of the Case.

1. The zoning ordinance whose constitutionality is challenged before this court, was enacted in June, 1941, and placed petitioners' property in zone B1, Beach Recreational District. From 1923 until the enactment of said ordinance the property in question was zoned residential. During that eighteen year period not a single residence was constructed on said property. On August 9, 1940 (some eleven months prior to the adoption of the ordinance in question, and while said ordinance was under active study and in the course of preparation) petitioner Neil McCarthy published an advertisement in the local newspaper disclosing his intention to enclose the property in question and operate the same as a public beach, charging admission for its use [Deft. Ex. A; R. 152].

> ". . . it was suggested that the beach be operated as are many beaches in the United States—by enclosing it and charging an admission price for its use. I advised your Mayor, Mr. Blech, that I expected to do this." [R. 153.]

On August 12, 1940, petitioner Neil McCarthy stated that under existing conditions the property could not be sold or subdivided for residential purposes or practically or profitably be used for such purposes and requested that the property be rezoned for business purposes so that he could realize an income from its use [Ex. 38, R. 112]. After having received, in June, 1941, by the ordinance in question, the very zoning which petitioners had requested, they did not use or make any attempt to use the property

for the purposes permitted by the ordinance [R. 39]. The only complaints voiced by petitioners relative to the ordinance in question were made after an action to condemn the property in question was filed in 1948 by the State of California. In the case at bar petitioners contend the property should properly be zoned residential.

2. If any residences were constructed on petitioners' property such residences would be right on the beach [R. 321] and would necessarily be constructed on pilings [R. 195, 272]. While petitioners' property as measured on the ground does vary in width from 174 to 184 feet, the westerly, or oceanward, boundary line thereof is the mean high tide line of the Pacific Ocean. Therefore, much of petitioners' property is covered with water during portions of each day even when the ocean is calm. During storms or when there are ground swells due to distant storms, a major portion of petitioners' property is under water [R. 318].

3. At times, waves have been observed breaking upon and over the former Pacific Electric right of way which in its entirety lies easterly and further landward of petitioners' property [R. 267, 298].

4. The area is of such a character because of the ocean and tides that it would not be usable for structural development [R. 283], but is eminently suited for beach recreational use [R. 306].

5. The contour of petitioners' property, which is sandy beach except for a very small portion thereof [from Sixth Street south there is a shallow outcropping of soil, R. 319], is that of a sharp slope to the ocean varying from one foot in ten to two feet in ten [Exs. B, C and D; R. 241, 257].

6. As observed by the trial court [R. 318] the westerly side of the petitioners' proposed 35-foot roadway is at least 12 feet lower than the former Pacific Electric right of way.

7. The houses in the City of Hermosa Beach, south of petitioners' property, which are visible in the photographic exhibit annexed to the Petition, are at least twenty feet *landward* or *easterly* from the westerly or seaward line of any houses which might be constructed on petitioners' property [Court view, R. 320].

8. The ordinance refers to The Strand and limits structures to four feet above the nearest portion of The Strand. The height of the walkway known as The Strand varies from four feet above the nearest portion of the beach area to fifteen feet above the sandy beach. Therefore structures could be constructed to a height of a minimum of eight feet up to a maximum of forty feet over the actual surface of the beach.

9. In 1940 when petitioners attempted to fence their property with a smooth wire fence petitioners property was zoned for residential [Ex. 15; R. 68] and, obviously, therefore, the construction of the fence constituted a violation of the then zoning ordinance.

10. The very section of the ordinance under attack contained relief provisions authorizing different uses upon application to the City Council [Sec. 10-B of Ex. 1 to Comp., R. 20B; also Pet. App. A, R. 11]. No such application was ever made [R. 264].

ARGUMENT.

Summary of Argument.

Point 1. Petitioners have not proved any taking of property without due process of law. Although their property had been zoned residential for more than eighteen years prior to the enactment of the ordinance in question not a single residence was constructed thereon. While said ordinance was under consideration and shortly prior to its adoption petitioners stated that the property could not be reasonably used for residential purposes and requested that it be zoned for beach business purposes in order that an income could be realized from the property, and evidenced a desire to operate the same as a private beach with an admission charge. Moreover, the county planning expert testified that he recommended the change of zone from residential to beach recreational in order to allow petitioners to make a profitable use of their property.

After petitioners had by the ordinance in question received the very zoning which they had requested, they did not use nor attempt to use the property in conformity with the zoning ordinance and did not make any complaint, ask for any variance, or challenge the ordinance in any manner until after the State of California in 1948 brought an action to condemn the property. After the condemnation action had been filed, petitioners challenged the validity of the ordinance mainly on the ground that it constituted a taking of their property without due process of law. Yet petitioners did not introduce one particle of evidence as to the relative value of the property as residential property as contrasted to beach recreational property. No evidence of *any* dimunition in value resulting from the ordinance in question was introduced.

In fact, the evidence indicates that both petitioner Neil S. McCarthy and the planning expert Cook, believed at the time the ordinance was enacted that beach business zoning would *increase* the value of the land. The attack on the ordinance in question would appear to be a belated attempt to give an inflated value to the property which inflated value petitioners apparently hope will be reflected in any award which may be made in the condemnation proceedings.

Point 2. The ordinance in question was adopted after numerous public hearings and after intensive study and consideration by, among others, experts in the zoning field. Said ordinance was and is a valid and proper exercise of the police power designed as a part of the master plan of the City of Manhattan Beach to promote the public health, safety, morals and general welfare of the City of Manhattan Beach. The undisputed physical facts, evidence and findings of the trial court amply sustain the validity of the ordinance in question, and particularly the finding of the court that reasonable minds might differ as to the suitability of petitioner's property for residential development and that any residences constructed on said property would necessarily be constructed on pilings, thereby causing a serious police problem and threat to the public morals by reason of the possible use of the area under said structures for immoral purposes.

Point 3. No improper motive or purpose actuated respondent in enacting the ordinance in question. The record is clear that both petitioners and respondent endeavored for many years to interest one or more governmental authority in the property with the view to the purchase of the property by such governmental authority

and the establishment of the property as a public beach. Such negotiations at all times were carried on in good faith by all parties. Also, no evidence as to any improper motive was introduced. Not one city official was called to the witness stand to testify on this point.

Moreover, it is well settled that the purpose or motive of city officials in enacting an ordinance is irrelevant to an inquiry concerning the reasonableness of the ordinance. If the physical conditions justify the enactment of the ordinance the motives promoting its enactment are of no consequence. If the physical conditions do not justify the enactment, the ordinance must fall and the inquiry as to motive becomes useless.

Point 4. Zoning ordinances are endowed with a strong presumption of validity, that is, that it is presumed that they are reasonably adapted to promote the public health, morals, safety and general welfare of the community. Where, as in the case at bar, at the very least, the reasonableness of the ordinance is fairly debatable, the courts will not substitute their judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. Where, as in the case at bar, reasonable minds might differ as to the suitability of the property for residential development, the suitability of said property for beach recreational use, and the need to prevent the property in question from becoming a veritable breeding place of crime, the validity of the ordinance must stand.

POINT I.

The Ordinance Does Not Violate the Due Process Clause of the Fourteenth Amendment.

Petitioners contend that the ordinance so limits the use of their property as to constitute a taking thereof without due process of law. The record is devoid of any evidence supporting this contention.

For eighteen years (1923 to 1941) the property was zoned residential and not a one residence was constructed thereon. On August 9, 1940, at a time when the ordinance in question was under consideration and in the course of preparation, petitioner Neil S. McCarthy disclosed his intention to operate the property as a public beach charging admission for its use [Ex. A, R. 152]. Three days later, on August 12, 1940 Petitioner Neil S. McCarthy addressed a communication to respondent wherein he stated that the property could not be subdivided or sold as residential property or practically or profitably used as such and requested that it be rezoned [Pltf. Ex. 38, R. 112].

The county planning expert loaned to respondent in connection with the preparation of the ordinance in question testified that it would be "bad" and "unreasonable" zoning for the property in question to be continued to be zoned residential, that same property was eminently suitable for beach recreational use and that one of the considerations resulting in the enactment of the zoning ordinance in question was a desire to provide the owners of the property with the right to derive an income from it [R. 306-307].

From the enactment of the ordinance in question in June, 1941, to the time of the filing of the within action,

petitioners did not use or attempt to use the property in conformity with the ordinance in question [R. 39]. Petitioners did not introduce a particle of evidence that it could not have been profitably used in conformity with the ordinance nor did they introduce any evidence as to the relative values of the property as residential property as contrasted to beach recreational property. In fact, no evidence of value whatsoever appears in the record.

On these facts, respondent submits there is an entire absence of any showing of a taking of property or a denial of equal protection of law as guaranteed by the Fourteenth Amendment, and further, that there is not a particle of evidence to support petitioner's bald assertion (Pet. 21) that the ordinance deprives them of any reasonable or profitable used of the property.

Respondent has no quarrel with the general proposition that property may not be taken for public use without compensation and without due process of law. It is apparent, however, that each exercise of the police power of a municipality, and particularly each zoning ordinance, insofar as it restricts the use of property to the slightest degree, does interfere with the owner's use of the property and thereby *may* cause some dimunition in the value of the property. However, the constitutionality of zoning ordinances, restricting as they do the use of property, is no longer open to quested (*Euclid v. Ambler Realty Co.*, 272 U. S. 365). Respondent would be the first to agree that when the extent of a diminution in value of property resulting from a zoning ordinance reaches a certain magnitude (sometimes called a "shocking diminution") it may constitute a taking of the property. But, as this court held in *Pennsylvania Coal Co. v. Mahon,*

260 U. S. 393, this is a question of fact and the greatest weight is to be given to the judgment of the legislature. In the case at bar, there is no evidence of *any* diminution in value of petitioners' property resulting from the ordinance. In fact, there is no evidence of any value whatsoever. In short, petitioners failed to prove a taking of property (*Calif. Auto Assn. v. Maloney,* 341 U. S. 105, 111).

The cases relied upon by petitioners and set forth at page 23 of the petition, are, respondent believes, clearly distinguishable. As was stated by the Supreme Court of the State of California [R. 376] quoting from *Zahn v. Board of Public Works,* 195 Cal. 497, 234 Pac. 388; affirmed 274 U. S. 325:

> "Every exercise of the police power is apt to affect adversely the property interests of somebody."

The Supreme Court of California also aptly stated in the case at bar [R. 377]:

> "Factually dissimilar cases cannot avail plaintiffs in their attack upon the zoning restrictions upon due process grounds."

In the majority of the cases relied on by petitioners, there was evidence of a shocking diminution in the value of the property, resulting from the zoning ordinance. In *Pennsylvania Coal Co. v. Mahon, supra,* the diminution was total, the property was rendered valueless. In the remainder of petitioners, cited cases, the value was shockingly reduced, as for example in *Long v. City of Highland Park,* 329 Mich. 146, 45 N. W. 2d 10, from $40,000.00 to $3,000.00.

In the case at bar, *no* diminution in value was proven, in fact, no evidence of value whatsoever was introduced. On the contrary, the evidence indicates that at the time the ordinance was enacted, petitioner Neil S. McCarthy and the planning expert believed the value of the property would be *increased* by rezoning from residential to beach use.

There is no evidence that petitioner's property was taken or that petitioners were denied equal protection of law in contravention of the Fourteenth Amendment.

POINT II.

Section 10 of the Ordinance Is a Proper Exercise of the Police Power.

The trial court found that reasonable minds might reasonably differ (1) as to the safety of residences constructed on petitioners' property, and (2) whether said property would be suitable for residential development [R. 37, 39, 370]. Said court also found that residences constructed on pilings might create police problems by reason of the possible use of the areas under said structures for immoral purposes. Petitioners contend such findings are without "substantial support" in the evidence. Respondent submits that the evidence, a portion of which is hereinafter referred to, amply supports such findings and clearly demonstrates that the ordinance is in the words of the trial court "palpably related to the general welfare" [R. 331] and a proper exercise of the police power of respondent.

A. Safety of Residences Constructed on Pilings and Suitability of Subject Property for Residential Development.

Petitioners' sole evidence on this question consists of the testimony of their expert witness Col. Leeds, engineer, who testified on *direct* examination that residences could be constructed on the property, that he recommended construction on steel concrete pilings and that if constructed in accordance with a sketch received in evidence as Exhibit 62 [R. 198], said residences could be constructed without fear of damage from the Pacific Ocean [R. 198]:

> "Q. By Mr. Diether: In your opinion, Colonel Leeds, if the house was constructed at the elevation that you have just testified to in the manner indicated on the chart which you have described, could such a house be constructed without fear of damage from the Pacific Ocean? A. Yes, sir."

On *cross*-examination said Colonel Leeds admitted that reasonable minds might differ as to the dangers of such constructions [R. 231]:

> "Q. Would you feel, Colonel, that intelligent and reasonable minds might reasonably differ as to the possible danger of construction of residences in accordance with the scheme indicated on Exhibit 62? A. Yes, I think you would find difficulty in getting all engineers to agree on one solution as being the only solution. It would depend on the degree of safety that you wanted, and various other factors. Only a very, very foolish engineer claims to be infallible."

Parenthetically, it should be noted that it is obviously humanly possible by the use of engineering skills to "safely" construct buildings many miles out in the ocean.

This court may take judicial notice of the fact, as did the Supreme Court of California [R. 374], that many offshore oil drilling and pumping derricks are located far out in the ocean and in the Gulf of Mexico. Thus as an academic issue there is no question but that residences might at considerable expense and by the expenditure of considerable engineering skill be "safely" constructed on petitioners' property provided the pilings were driven deep enough and the residences constructed high enough over the beach, thus eliminating all possible tide and wave action of the Pacific Ocean. However, the issue before the trial court was *not* whether it was or was not humanly possible to construct residences in such a manner as to be "safe" in times of storms, high tides and heavy ground swells. The issue was whether or not reasonable minds might differ as to whether petitioners' property was suitable for residential development and one factor in this determination was whether or not the normal beach residences constructed on the property would be free from dangers of destruction from the sea. This is illustrated by the testimony of petitioners' expert, Colonel Leedo, who stated that residences could be built, that he would build them in a certain manner, and that reasonable minds might differ as to their safety if thus constructed. If petitioners' eminently qualified expert admits that reasonable minds might differ can more be expected of respondent and is not this conclusive that the suitability of the property for residential development was a question upon which reasonable minds might differ?

Moreover, the trial court's finding of the unsuitability of the property for residential development finds further support in the following evidence:

1. In the 18 years the property was zoned residential not a single residence was constructed thereon.

2. Petitioner Neil S. McCarthy on August 12, 1940 stated that it could not be sold, subdivided or practically or profitably used for residential purposes and requested that it be rezoned [Ex. 38; R. 112].
3. The testimony of the county planning expert loaned to respondent to assist in the preparation of the ordinance in question was that residential zoning of the property would be "bad" and "unreasonable" and that he recommended the beach recreational zoning since the property was eminently suited for such use in order to allow the owners to derive an income from it [R. 306, 307].
4. Much of petitioners' property is covered with ocean water during portions of each day.
5. During storms or heavy ground swells a major portion of the property is under water [R. 318].
6. Ocean waves have been observed breaking upon and over the former Pacific Electric right-of-way which in its entirety lies eastward, or landward, of petitioners' property [R. 267, 298].
7. Any residences constructed on the property would all be right on the beach and unless protected by an adequate sea wall it would be subject to constant hazard of destruction by the sea [R. 321].

On the basis of the foregoing evidence respondent submits that there was substantial support for the finding that reasonable minds might differ as to the suitability of the property for residential use. The only plan for residential development suggested by petitioners provided for residences erected at an elevation considerably lower than the elevation of the former Pacific Electric right-

of-way [Ex. 62; R. 198]. When this is considered in connection with the uncontradicted testimony of witnesses who had lived for years in the City of Manhattan Beach that they had seen waves come up on the said Pacific Electric right-of-way [R. 267, 298] which is considerably higher and further landward than petitioners' property, it would appear obvious that with reference to the only type of residential constructions suggested by petitioners that ocean water might reasonably be expected on occasion to go over the eaves of any residence constructed thereon [R. 330]. Respondent submits that at the very least this amply demonstrates that the suitability or non suitability of the property in question for residential development was fairly debatable and a question upon which reasonable minds might differ. In fact, respondent submits that it would be difficult to find a reasonable mind which on such evidence would conclude that the property should, under good zoning practice, be developed for residential purposes.

B. The Construction of Residences on Pilings Tends to Create Police Problems and Adversely Affects Public Morals.

Witness Sights, Chief of Police of respondent testified that if residences were constructed on pilings, that due to the secluded nature of the area under the residences such areas would create special police problems. He testified that he had met such problems consisting of juvenile delinquency, sexual perversion etc., in connection with the policing of the area under the municipal pier

[R. 296, 297]. While said witness admitted that he was not familiar with police problems connected with *houses* constructed on pilings [R. 301], he testified that such problems would be the same as he then had with respect to the municipal pier [R. 299]. This is obvious since it matters not what structure is *over* the piling. The only relevant fact is that there is a secluded area *under* the structure which serves as a veritable breeding place for crime and juvenile delinquency. In short, construction on pilings is not the normal type of construction and of itself justifies restricted zoning. Municipal ordinances tending to minimize opportunity for immoral practices have long been upheld as a proper exercise of the police power, as for example in kindred cases involving billboards.

Cusack Co. v. City of Chicago, 242 U. S. 526, 529:

> "Upon the question of the reasonableness of the ordinance, much evidence was introduced upon the trial of the case, from which the Supreme Court finds that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals * * * there remains sufficient to convincingly show the propriety of putting billboards * * * in a class by themselves * * * and to justify the prohibition against their erection in residence districts of a city in the interests of safety, morality, health and decency of the community."

POINT III.

Motive or Purpose of Respondent in Enacting the Ordinance in Question.

A. No Improper Motives or Purposes Actuated Respondent in Enacting the Ordinance in Question.

The record is clear that both petitioners and respondent endeavored for many years to interest one or more governmental authority in the property with the view to the purchase of the property by such governmental authority and the establishment of the property as a public beach. Such negotiations at all times were carried on in good faith by all parties. As the trial court said [R. 148]:

> "The record * * * is replete with documentary evidence showing that both parties were doing whatever they could to try to get some State agency to buy the land * * *."

The record referred to by the trial court consists of plaintiff's exhibits 21 through 33 inclusive and is illustrated by the following statement of petitioner Neil S. McCarthy [Ex. 27; R. 109 dated April 10, 1940]:

> "I am looking forward to the cooperation of the city in our attempt to dispose of the property, in the same manner that we have previously tried to cooperate with the city in our efforts to have some of the other public bodies push the property for the city."

The only request for rezoning made by petitioners until after the State of California had brought an action to condemn the property, is contained in Plaintiff's Ex 38 [R. 112] consisting of a letter in which petitioner McCarthy stated that since the property could not practically or profitably be utilized for residential development and

could not be subdivided or sold as such, that the property be rezoned. On August 22, 1940 said informal application for rezoning was denied but [Ex. 41; R. 114].

> "without prejudice to Mr. McCarthy making further proposals on this matter and if detailed plans for the operation and conduct of the enterprises Mr. McCarthy proposed to develop are submitted, it is possible that an interpretataion of the present Master Plan of Land Use would show that such use as proposed by McCarthy would be permitted, or in case the matter is not settled until after the detailed zoning ordinance shall have been adopted, that the proposed uses either would be permitted under the ordinance or could be handled by variance procedure."

In spite of the clear indication on the part of respondent to do everything within its power to cooperate with petitioners and allow them to use their property as they so desired, no further request was made of respondent, no variance application filed, and no action whatsoever taken until after the State of California brought its action to condemn the property for a state park.

Without further comment respondent submits that the record falls far short of showing an evil motive or purpose on the part of respondent, and on the contrary, shows absolute cooperation and good faith toward petitioners at all times.

Furthermore, as noted by the Supreme Court of California [R. 380] petitioners did not call one city official to the witness stand to testify as to the matter of motive

or purpose and thus no proper evidence of motive or purpose was before the court (*Safeway Stores v. City Council, San Mateo,* 86 Cal. App. 2d 277, 287, 194 P. 2d 720).

Petitioners attempt to draw support from the allegation that they attempted to fence their property in July 1940 and that the fence was destroyed by mobs. The possible damage through mob violence and respondent's liability, if any, in connection therewith are matters fully covered by statute (Cal. Govt. Code, Secs. 50140, 50141) and are not germane to the issue of reasonableness of the zoning ordinance. Moreover, *after* petitioners alleged difficulties in fencing, petitioner Neil S. McCarthy in August 1940 wrote Plaintiff's Exhibit 38 which admits the property could not be subdivided or sold as residential property or practically or profitably used for such purposes.

B. The Motives of the Legislative Body in Enacting an Ordinance Are Immaterial to Its Validity.

The purpose or motive of the city officials in enacting a zoning ordinance is not relative to any inquiry concerning the reasonableness of the ordinance. If the conditions justify the enactment of the ordinance the motives are of no consequence; if the conditions do not justify the enactment the inquiry as to motive becomes useless (*Sunny Slope Water Co. v. City of Pasadena,* 1 Cal. 2d 87, 99, 33 P. 2d 672). The cases cited by petitioners as examples of the maladministration of the police power involve factual dissimiliarities which renders

them inapplicable here. As hereinbefore noted, in the majority of said cases the evidence clearly demonstrated the relative value differentials in the property brought about by the zoning ordinances in question and disclosed a shocking diminution in value. In the case at bar we have no evidence of any diminution in value as a result of the zoning ordinance and on the contrary as hereinbefore demonstrated the evidence indicates that the present zoning when enacted, was thought by petitioners and the zoning expert to be more beneficial to petitioners. The case of *Dobbins v. Los Angeles,* 195 U. S. 223, is clearly distinguishable on its facts. Said case arose on demurrer in this court said at page 240:

> "Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case * * *."

See, also:

Detroit United Railway v. Detroit, 255 U. S. 171, 178.

In the case at bar the facts clearly authorize the exercise of the power and therefore any inquiry into the purpose or motive prompting its exercise is immaterial.

POINT IV.

General Zoning Principles Applicable to the Case at Bar.

This court has long recognized, beginning with *Euclid v. Ambler Realty Co., supra,* that restrictive zoning ordinance are a proper exercise of the police power. As this court said in *Zahn v. Board of Public Works, supra,* at 328:

> "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (Citing cases.)

To the same effect:

Standard Oil Co. v. Marysville, 279 U. S. 582.

The aforementioned rule has long been followed in the State of California. (*Lockard v. City of Los Angeles,* 33 Cal. 2d 453, 202 P. 2d 38, cert. den. 337 U. S. 939; *Clemons v. City of Los Angeles,* 36 Cal. 2d 95, 222 P. 2d 439; *Wilkins v. City of San Bernardino,* 29 Cal. 2d 332, 171 P. 2d 542. The case at bar would appear to be one in which, at the very least, the reasonableness of the ordinance was fairly debatable and the ordinance should therefore stand.

Conclusion.

Respondent submits that the language of the Supreme Court of Michigan in *Fenner, et al. v. City of Muskegon,* 331 Mich. 732, 50 N. W. 2d 210, 212, could well have been said with reference to the property involved in the case at bar:

> " 'It (the land) is mucky, wet, sandy and low and it would seem always in danger in the event of flood or high waters. Up to this point it would seem that the past owners and present owners have used it to the best of their ability, for the only purpose to which it is adaptable.'
>
> Clearly, the land is not suitable for residential purposes nor any purposes under Class 'A' of the zoning ordinance."

Respondent further submits that the instant case is comparable to the *City of Miami Beach v. Hogan,* 63 So. 2d 493, Pet. for Writ of Cert. den. 346 U. S. 891. In the *Hogan* case the property had been zoned residential since 1930. In 1950 an action to condemn the property was filed. Petitioner in that case sought to enjoin the condemnation action charging that the proper zoning of the property was for business. The Supreme Court of Florida declared at page 495:

* * * * * * * *

> "The landowner in this case sat idly by and took no action about the zoning ordinance adopted on December 3, 1930, until it brought this suit. After the city had decided to acquire the property by the exercise of eminent domain the landowner goes into a court of equity in an attempt to have the property rezoned, not because he wished to erect a hotel, but because if it is rezoned for hotel use, the value will

be greatly increased and the city will be compelled to pay the increased value brought about by rezoning in order to obtain the property for a public purpose.

* * * * * * * *

"If the Courts adopt the policy of substituting their judgment for that of the city officials, simply because of their refusal to rezone the property in accordance with the wishes of the landowner to increase the value of the land, they will eventually become the zoning board for every county and municipality in the State."

Respondent submits that the present challenge to the zoning ordinance and the petition for Writ of Certiorari should be recognized for what it is, to wit, an unjustified effort to obtain a fancied advantage in the valuation of the property for the purposes of a condemnation action, that no valid grounds for a Writ of Certiorari are present, and that therefore the Petition for Writ of Certiorari should be denied.

Dated: June 14, 1954.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. [redacted] 78

October Term 1953

NEIL S. McCARTHY, MARGUERITE G. McCARTHY, his wife, and FRED B. HUESMAN, NURMA W. HUESMAN, THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES, as Trustees under the Will of RALPH R. HUESMAN, Deceased,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petitioners' Reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of California.

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SUBJECT INDEX

Page

Respondent's amplification of petitioners' summary statement of the case is somewhat inaccurate 1

Respondent's summary of argument contains many inaccurate statements of fact from which erroneous conclusions are drawn 12

Argument 13

Reply to Respondent's Point 1. Respondent's contention that the zoning ordinance does not violate the due process clause of the Fourteenth Amendment is without merit 13

Reply to Respondent's Point 2. Respondent fails to show that the zoning ordinance had any relation to the legitimate exercise of police power 19

Reply to Respondent's Point 3. Motive of legislative body in enacting the ordinance in question was material and relevant on the question of its validity 25

Reply to Respondent's Point 4. General zoning principles have no application to the case at bar 27

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases	Page
Abie State Bank v. Bryan, 282 U. S. 765	6
Arverne Bay Const. Co. v. Thatcher, 278 N. Y. 222, 15 N. E. 2d 587	15
City of Baltimore v. Cohn, 105 A. 2d 482	15
City of Miami Beach v. Hogan, 63 S. 2d 493, cert. den., 346 U. S. 819	27
Cusack Co. v. City of Chicago, 242 U. S. 526	24
Hesse v. City of Euclid, 118 N. E. 2d 682	15
Nashville, Chattanooga & St. Louis Ry. Co. v. Walters, 294 U. S. 405	6
Pennsylvania Coal Co. v. Mahon, 260 U. S. 393	15
Pumpelly v. Green Bay Co., 80 U. S. 166	16
Red Canyon Sheep Co. v. Ickes, 98 F. 2d 308	16
Ritenour v. Dearborn Tp., 326 Mich. 242, 40 N. W. 2d 137	15
Seattle Trust Co. v. Roberge, 278 U. S. 116	24
Varney v. Lee, 180 Cal. 329	16
Weinberg v. No. Pac. Ry. Co., 130 F. 2d 645	22
West Ohio Gas Co. v. Commission (No. 1), 294 U. S. 63	16

Statutes	
City of Manhattan Beach Ordinance No. 302:	
Sec. 6B-G	4
Sec. 10	6
Sec. 10-B	12
Sec. 10-C-1	10
Sec. 15-A-1	12

IN THE

Supreme Court of the United States

October Term 1953

No. 765

NEIL S. MCCARTHY, *et al.*,

Petitioners,

vs.

CITY OF MANHATTAN BEACH, a municipal corporation,

Respondent.

Petitioners' Reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of California.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners hereby reply to Answer of Respondent to Petition for Writ of Certiorari to the Supreme Court of the State of California.

Respondent's Amplification of Petitioners' Summary Statement of the Case Is Somewhat Inaccurate.

Respondent has set forth under ten numbered paragraphs (Ans. pp. 2-4) what are designated as material facts omitted from petitioners' Summary Statement of the Case. The purported facts stated by respondent are, in many instances, not material and are inaccurate and

incomplete. We will discuss the same seriatim in the order in which they appear in respondent's Answer.

1. Respondent states that although petitioners' property was zoned for residential purposes for a period of eighteen years immediately prior to the adoption of the ordinance in question, not a single residence was constructed on said property during said period. Respondent failed to state that for fourteen of the eighteen years mentioned the respondent clouded the title to the property by instituting, maintaining and unsuccessfully prosecuting, to the state court of last resort, proceedings seeking to quiet title in the respondent to the property on the theory that the property had been dedicated to public use (see Pet. p. 3).

Respondent calls attention to the fact that approaching one year prior to the adoption of the ordinance in question, in an advertisement appearing in a local newspaper, Mr. McCarthy stated that he expected to enclose the property and charge admission for its use. Counsel for respondent, however, failed to inform the court that Mr. McCarthy did not follow up his intention to charge admission for the use of the property and that petitioners never operated the property as a private beach [R. 310].

Mr. McCarthy testified that the suggestion referred to in the advertisement that the property be operated as a private beach was not his but that of a man on the Hermosa Beach newspaper, and further that he investigated the possibility of using his property for such purpose and found "he was entirely wrong." The suggested use was on the fashion of Jones Beach and Mr. McCarthy further stated he found it was a losing proposition with an expenditure of several million dollars [R. 153-154]. There

is no evidence in the record that petitioners had any knowledge that the ordinance in question was under study or in the course of preparation at the time of the publication of said advertisement.

The fact that Mr. McCarthy wrote a letter [Ex. 38] to the City Council requesting it to rezone his property from residential to business almost a year prior to the adoption of the ordinance in question is immaterial to any of the issues raised by the Petition. It will be noted that Mr. McCarthy in said letter stated "that under existing conditions it [petitioners' property] cannot be sold or subdivided" for residential purposes. At that time World War II was in progress and it was difficult to secure labor or materials for residential construction and the war likewise had a corresponding effect on the demand for beach front residential property. Since 1940 it is common knowledge that Southern California has had a tremendous influx in population. Manhattan Beach has increased in population from 6,400 in 1940 to 25,000 in 1951, or an increase of 390% [R. 276]. Since the termination of the war there has been a great demand for beach front residential property.

Also, from 1935 to 1946 there were from 40 to 57 feet of accretions added to petitioners' property[1] [R. 212-215].

---

[1]From 1935 to 1946 at the locations hereinafter mentioned accretions were added to petitioners' property in the amount set opposite each location:

Fourteenth Street	Station	117+50	46 Ft.	[R. 212]
Twelfth Street	"	122+50	49 "	[R. 212]
Eleventh Street	"	127+50	49 "	[R. 213]
Ninth Street	"	132+50	48 "	[R. 214]
Seventh Street	"	137+50	50 "	[R. 214]
Fifth Street	"	142+50	50 "	[R. 215]
Third Street	"	147+50	57 "	[R. 215]
Neptune Avenue	"	152+50	40 "	[R. 215]

Respondent implies that petitioners requested respondent to zone their property for beach recreational purposes (Ans. p. 2). This statement is incorrect. Petitioners' only request to the City Council prior to the adoption of the ordinance in question relative to the zoning of their property was that it be rezoned for "business purposes" [Ex. 38].

Petitioners have no more assurance now than they did at the time this action was filed in the trial court that the State of California will prosecute its condemnation proceedings to judgment and that it would satisfy the same. The case has been pending since 1948 [R. 369] and has never been set down for trial. Yet petitioners have been compelled to pay taxes of approximately $9,000.00 a year on property which is clouded by said condemnation action [Ex. 50].

2. Respondent states that any residence constructed on petitioners' property would be "right on the beach" (Ans. p. 3). This would be true of a residence constructed on any ocean beach. Petitioners' property varies in depth from 174 to 184 feet which is ample under the residential restrictions in the ordinance in question for residential development (Sec. 6B-G of Ord. 502) [R. 20B]. Respondent states that "much of petitioners' property is covered with water during a portion of each day even when the ocean is calm" (Ans. p. 3). This statement is also incorrect. The westerly (oceanward) boundary of petitioners' property is the line of mean high tide which is the average of all high tides [R. 205]. Therefore, when the high tide is at mean or below there will be no water on petitioners' property [R. 205].

Respondent states that during storms or when there are ground swells the major portion of petitioners' property is under water (Ans. p. 3). Under such conditions a portion of petitioners' property will be under water, but there is no evidence that it will be a major portion. In fact, there is no evidence as to what portion would be under water. The mean high tide at petitioners' property is 4.6 feet above mean lower low water [R. 180; Ex. 61], and the maximum theoretical high tide is 8 feet, but such a tide has never been observed [R. 181-182]. If the tide ever reached the theoretical maximum of 8 feet, from 130 to 140 feet of petitioners' property west of the proposed 35-foot roadway would have an elevation above said 8-foot tide[2] [R. 212-215].

Petitioners' expert, Leeds, testified that he would recommend that the foundations of residences constructed on petitioners' property be at an elevation of approximately 20 feet above mean lower low water, which he expressed as being "thoroughly conservative" [R. 225]. Such elevation would be 12 feet above the theoretical maximum high tide of 8 feet.[3]

3. Respondent states that at times waves have been observed "breaking upon and over" the former Pacific Electric right of way which lies easterly of petitioners'

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[2]All distances testified to by Colonel Leeds at pages 212-215 of the printed record were from the center line of the former electric railway right of way. The west line of the proposed 35-foot roadway is 60 feet (35+25) west of said center line. Consequently, the figures 130 to 140 feet stated above were arrived at by deducting 60 feet from each of the figures testified to by Colonel Leeds.

[3]The suggested elevation of 20 feet for the foundations of houses on petitioners' property is 3 feet higher than the walk (being the top of sea wall) in front of the houses in Hermosa Beach to the south of petitioners' property shown in the frontispiece [R. 224; Exs. 18 and 61].

property (Ans. p. 3). The evidence does not bear out this statement. As we will presently point out, the evidence shows that the high water referred to occurred in 1933. There is no evidence of waves splashing on or encroaching upon the electric railway right of way or anywhere near it since 1935. Between 1935 and 1946 from 40 to 57 feet of accretions were added to petitioners' property [R. 212-215].

Although the zoning ordinance was passed in 1941, it was challenged before the respondent's Planning Commission in 1950 [R. 21-22] and this action was brought in 1951 [R. 7]. The validity of Section 10 of the zoning ordinance is to be determined on the facts as they existed at the time it was challenged and not at the time of its enactment. This court has repeatedly held that a statute valid when enacted may become invalid by a change in the conditions to which it is applied (*Abie State Bank v. Bryan*, 282 U. S. 765, 776; *Nashville, Chattanooga & St. Louis Ry. Co. v. Walters*, 294 U. S. 405, 415).

The only testimony in the record as to the extent of high water on petitioners' property at time of high tide and storm was given by two witnesses who testified for respondent, both of whom were employees of respondent. One of the witnesses, Mr. Flannigan, secretary to the Planning Commission, testified that on one occasion since 1925 at time of high tide and storm he observed that breakers would break at about the line of the seaweed or kelp [approximately at the wheel lines along the beach appearing in the picture on the frontispiece in the Petition and marked by the witness with an X on Exhibit 1] and "come up a grade farther than shown on the exhibits" and as he expressed it "come up to, you might say, the westerly

edge of the P. E. right-of-way, or splash over that," and that was the highest he had ever seen the water during that time [R. 267-269]. The witness did not state when he observed the high water referred to but related it to the time a barge drifted up on the beach [R. 267]. The other witness, Mr. Sights, Chief of Police of respondent City, stated this occurred 17½ years prior to the trial or in 1933 [R. 298].

Mr. Sights testified that he had been a resident of Manhattan Beach for approximately 30 years and during that time on one or two occasions (one of which he remembered was 17½ years ago) he had seen water against the "westerly edge" of the Pacific Electric right of way [R. 293, 298, 299]. Whether the "water" referred to was the result of ocean spray or the run of the waves is not shown.

Petitioners' expert, Leeds, was cross-examined as to the extent of wave action on petitioners' property above the 8-foot maximum theoretical high tide. He testified in substance that the contour of a beach is normally a pretty good indication of just how far the waves have gone in times past; the crest of the beach (petitioners' property) is normally around 12 to 15 feet which indicates that that is as far as the waves have traveled landward with their suspended sand and have dropped it before receding into the ocean; that he wouldn't anticipate any waves reaching the proposed 35-foot roadway on the easterly side of petitioners' property, but even if they did the most severe waves would scour out the beach as it has in times past to maybe a depth of one or two feet and succeeding lesser waves will fill it up again and houses built upon the property would be perfectly safe; the existing profile of petitioners' property is a pretty

good indication as to what has occurred in the past; there is no indication that the electric railway right of way was cut out in the region of petitioners' property and no riprap was placed in order to protect it [R. 222, 229, 230].

The fact that neither the right of way nor the westerly portion of petitioners' property has been cut in recent years by wave action is clearly shown by the fact that at the time of the trial foliage was growing on said area except at the south end where an outcropping of soil exists (see frontispiece to Petition) [R. 37].

Moreover, petitioners' property is not located in a zone of erosion or severe wave action since *there is a ridge in the ocean floor out in front of the Manhattan-Hermosa area.* This underwater configuration of the earth prevents the concentration of waves or ground swells from submarine fjords or chasms such as occur at La Jolla and Redondo Beach, California [R. 228].

4. Respondent states (Ans. p. 3) that the area (petitioners' property) is of such a character that it would not be usable for structural development because of ocean and tides [citing the record at p. 283, being the testimony of Mr. Petrie, City Manager of respondent]. This conclusion of the witness is not supported by any competent evidence. Respondent introduced no evidence on that subject. Mr. Petrie, as a reason for his conclusion that the ordinance was proper, stated that the ocean and the tides affected the area to such a degree "that you wouldn't use it for structural development" [R. 283]. The other reasons expressed by the witness [R. 290] (quoted in the Petition on p. 28) show that the effect of the ocean and tides on petitioners' property was not the basis for his

conclusion. Mr. Petrie was qualified as a zoning expert, not as a sea coast engineer. There is no evidence that he made any study of the effect of the ocean and tides on petitioners' property or any other property in the vicinity, nor that he was qualified as an expert on that subject.

5. Respondent states (Ans. p. 3) that the contour of petitioners' property is of a sharp slope to the ocean varying from one foot in ten to two feet in ten. Such a contour does not indicate that petitioners' property is not suitable for residential development. Petitioners' expert, Leeds, whom respondent stipulated was eminently qualified [R. 158], stated in his opinion that on such a contour [which is shown on Ex. 62] it was practicable and feasible to construct dwellings on petitioners' property [R. 222], and such evidence was not contradicted.

6. Respondent states that the trial court observed that the westerly side of petitioners' proposed 35-foot roadway is at least 12 feet lower than the electric railway right of way (Ans. p. 4). The trial judge so stated, but an analysis of his remarks shows he made no accurate measurements and was referring to an area north of the pier [R. 317]. The profile of petitioners' property north of the pier prepared by the City Engineer of respondent and introduced in evidence as Exhibit D shows that at Twelfth Street, located approximately 250 feet north of the pier, the center line of the electric railway right of way is approximately 8 feet above the westerly line of the proposed 35-foot roadway.

7. Respondent states (Ans. p. 4) that the houses in the City of Hermosa Beach visible in the photographs in the frontispiece to the Petition are at least 20 feet land-

ward or easterly *"from the westerly or seaward line of any houses which might be constructed on petitioners' property* [Court view, R. 320]." The trial judge's remarks in his oral ruling [R. 320] do not support respondent's statement. The trial judge in speaking of 20 feet was talking about a hypothetical situation in the City of Hermosa Beach. Moreover, respondent's argument assumes that there was a westerly or seaward line for houses which might be constructed on petitioners' property. Necessarily, no "westerly or seaward [building] line" is established on petitioners' property by the ordinance here challenged, for the ordinance forbids the erection of any building thereon. No regulation establishing a front or rear building line on petitioners' property is shown by the record.

8. Respondent's statement (Ans. p. 4) that "The ordinance refers to The Strand and limits structures to four feet above the nearest portion of The Strand" is inaccurate and perhaps misleading. In this particular we call the court's attention to the provisions of Section 10-C-1 of the ordinance: "No buildings, structures, walls, or fences shall be erected in the B-1 District, except lifeguard towers and open smooth wire fences neither of which shall have a height greater than four feet above the grade of the nearest portion of *the strand*" [R. 20B]. The ordinance does not refer to the walkway known as "The Strand." The word "strand" as used in the portion of the ordinance above quoted very definitely means the shore or the beach. This is the common under-

standing and usage of the term as disclosed by an examination of any dictionary in common use. This erroneous construction of the ordinance by respondent is consistent with the similar erroneous construction of the ordinance reflected in the finding of the trial court [Fdg. II, R. 37]. But even if we assume respondent's erroneous construction is correct, it would not follow that the uses permitted, viz., authority to construct lifeguard towers and fences to a height of from 8 to 40 feet above the surface of the beach would compensate petitioners for the uses denied by the terms of the ordinance. The uses denied are not alone for residential uses but any reasonable and profitable use. Permissive use in connection with recreational purposes is likewise in effect a complete denial of use, for petitioners are not permitted to maintain rest rooms, comfort stations, first aid stations, dressing rooms, locker rooms or showers, buildings for housing of beach recreational facilities that may be rented, restaurants, soft drink stands and the like [R. 20B].

9. Respondent states that in 1940 when petitioners' property was zoned for residential it was a violation of the ordinance to construct a fence thereon (Ans. p. 4). This statement is erroneous.

The zoning ordinance in effect in 1940 is Exhibit 15. There is no provision therein prohibiting the construction of a fence. It is common knowledge that a fence is considered not only appropriate and proper in connection with residential development but often necessary.

10. Respondent states that the ordinance in question contains relief provisions authorizing different uses than beach recreation upon an application to the City Council and that petitioners made no such application (Ans. p. 4). The purported relief provisions referred to are in Sections 10-B and 15-A-1 of the zoning ordinance [R. 208]. It will be noted in Section 15-A-1 that the other uses permitted must be "similar to those mentioned" and "not more obnoxious or detrimental to the welfare of the community than the permitted uses." Section 10-B expressly limits the purported relief provisions so that under no circumstances in any one of the following uses permitted on petitioners' property: "residences, camps, trailer camps, garages, automobile parking lots, theatres, dance halls, shooting galleries, skating rinks, bowling alleys, roller coasters, merry-go-rounds, restaurants, cafes and saloons." The purported relief provisions referred to, therefore, give petitioners no relief whatsoever.

Respondent's Summary of Argument Contains Many Inaccurate Statements of Fact From Which Erroneous Conclusions Are Drawn.

Under the heading "Summary of Argument" (Ans. p. 5) respondent purports to state a summary of the four points discussed later in its Answer. Said summary contains numerous inaccurate statements of fact and erroneous conclusions of law. We will indicate these inaccuracies in this Reply to respondent's four points.

ARGUMENT.

REPLY TO RESPONDENT'S POINT I.

Respondent's Contention That the Zoning Ordinance Does Not Violate the Due Process Clause of the Fourteenth Amendment Is Without Merit.

In its Summary of Argument under Point I respondent states:

> "While said ordinance was under consideration and shortly prior to its adoption petitioners stated that the property could not be reasonably used for residential purposes and requested that it be zoned for beach business purposes * * *." (Ans. p. 7.)

A few lines further on respondent states:

> "After petitioners had by the ordinance in question received the very zoning which they had requested * * *." (Ans. p. 7.)

As we have previously pointed out (*ante* pp. 3-6), prior to the adoption of the ordinance in question petitioners made only one application to the legislative body of the city for change of zone of the property in question. On August 12, 1946, petitioners requested the City Council of Manhattan Beach to rezone said property for "business purposes" [Ex. 38]. The term "beach business purposes" was not used. There is no evidence that at the time petitioners made said application they knew that the zoning ordinance in question was under consideration. The only evidence of a hearing in connection with the adoption of the zoning ordinance was a notice of a hearing before the Planning Commission on November 20, 1946, "on the tentative official zoning map" [R. 363]. The

statement that petitioners evidenced a desire to operate the property in question as a "private beach with an admission charge" (Ans. p. 5) refers to a published advertisement in a local newspaper on August 9, 1940, which we have previously referred to (*ante*, p. 2), Mr. McCarthy testified that after the publication of said advertisement he found the private beach idea was "entirely wrong" and that it would be a losing proposition [R. 154].

Respondent states in its Summary of Argument:

> "Moreover, the county planning expert testified that he recommended the change of zone from residential to beach recreational in order to allow petitioners to make a profitable use of their property." (Ans. p. 5.)

The county planning expert referred to is Mr. Cook who testified for respondent. He did not testify as respondent states. After stating numerous reasons [R. 306-307] why he thought petitioners' property was properly classified as beach recreational, none of which had anything to do with police power, Mr. Cook stated:

> "I therefore recommended to the Planning Commission that they create this beach recreation zone which would give the owners of the property the right to derive an income from it." [R. 307.]

Mr. Cook's testimony does not in any way indicate that beach recreation would permit "profitable use" of petitioners' property or that residential use would not be profitable.

Respondent also asserts:

> "In the case at bar, there is no evidence of *any* diminution in value of petitioners' property result-

> ing from the ordinance. In fact, there is no evidence of any value whatsoever." (Ans. p. 10.)

and concludes that "petitioners failed to prove a taking of property." Respondent's premise is faulty and its conclusion a *non sequitur*.

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413, relied on by respondent, this court found that the statute there in question purported to abolish "a very valuable estate" in land and that hence "the extent of the taking is great." Extrinsic evidence of value was not averted to in the opinion. Likewise, in *Arverne Bay Const. Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587, 592, the court said:

> "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property." (Italics the court's.)

Diminution of value of property resulting from a regulation is only one species of evidence for consideration in determining if a taking has occurred. When the regulation on its face shows an unreasonable limitation on the use of property, a taking is shown without introducing specific evidence of diminution of value. See also:

> *Ritenour v. Dearborn Tp.*, 326 Mich. 242, 40 N. W. 2d 137, 140-141;
>
> *City of Baltimore v. Cohn* (C. App. Md.), 105 A. 2d 482, 486;
>
> *Henie v. City of Euclid* (C. App. Ohio), 118 N. E. 2d 682, 687-688.

In the case at bar, it is self-evident that Section 10 of the zoning ordinance effectually destroys the usefulness of petitioners' property (*Pumpelly v. Green Bay Co.*, 80 U. S. 166, 181). No reasonable man would attempt to use petitioners' property under the zoning ordinance here in question for beach recreation purposes knowing the facts as shown by the evidence in this case. A few of such facts are: (1) petitioners' property is bounded on two sides by public beach and on the third side by a public park; (2) only lifeguard towers and open smooth wire fences four feet high may be constructed on the property *thus preventing the construction* of restrooms, comfort stations, first aid stations, dressing rooms, locker rooms or showers, buildings for housing of beach recreational facilities that may be rented, and restaurants or soft drink stands; and (3) no parking lot for automobiles may be maintained.

It is common knowledge that in face of such facts petitioners' property could not be operated successfully as a private beach. Courts take judicial notice of those things which are common knowledge to the majority of mankind.

West Ohio Gas Co. v. Commission (No. 1), 294 U. S. 63, 72;

Varcoe v. Lee, 180 Cal. 338, 345;

Red Canyon Sheep Co. v. Ickes, 98 F. 2d 308, 314.

Respondent's contention that evidence of diminution of value is necessary to show a taking in this case is without merit. The limitations of use imposed on petitioners' property by the zoning ordinance here in question clearly constitute a taking under the provisions of the Fourteenth Amendment.

Respondent states that the evidence indicates that both Mr. McCarthy and respondent's witness Mr. Cook believed that at the time the ordinance was enacted that "beach business zoning" would increase the value of the property (Ans. p. 6). This statement finds no support in the evidence. Neither Mr. McCarthy nor Mr. Cook, directly or indirectly, stated that they thought the beach recreation zone would increase the value of petitioners' property. So far as we are aware, the phrase "beach business zoning" was not used by either Mr. McCarthy or Mr. Cook.

Respondent asserts that this case is a belated attempt by petitioners to give an inflated value to their property (Ans. p. 6). This statement is not true. Petitioners seek a court decree that the ordinance in question is invalid. If the ordinance is declared invalid, the petitioners will be permitted to make a reasonable and profitable use of their property and if it is later taken from them in the condemnation proceeding they should be entitled to its reasonable value.

Respondent has failed to justify the unreasonable limitation of the use of petitioners' property. Such unreasonable limitation, as pointed out in the Petition (p. 14), is worse than confiscation since petitioners deprived of its reasonable use are still obligated to pay taxes on their property.

Respondent introduced no evidence showing that beach recreation was a proper classification of petitioners' property. In fact, the testimony of Mr. Cook, who testified for respondent, shows clearly that the classification of petitioners' property as "beach recreation" was to enable

the respondent to acquire a public park on the beach. The witness stated:

> "The intent was to produce a [zoning] plan meeting all of the various zoning needs of the city, and a balanced plan was produced by including, among other things, one section of the city which was eminently suited for it for beach recreation." [R. 306.]

REPLY TO RESPONDENT'S POINT 2.

Respondent Fails to Show That the Zoning Ordinance Had Any Relation to the Legitimate Exercise of Police Power.

In the Summary of Argument, respondent states:

> "The ordinance in question was adopted after numerous public hearings and after intensive study and consideration by, among others, experts in the zoning field." (Ans. p. 6.)

As we pointed out previously (*ante*, p. 13), the evidence shows that only one hearing was held on the ordinance and that was to consider a tentative official zoning map. The evidence does not show that petitioners had any knowledge that the ordinance was being considered prior to its adoption. Respondent also states that the ordinance was adopted as a part of a master plan "to promote the public health, safety, morals and general welfare of the City of Manhattan Beach" (Ans. p. 6). The evidence is to the contrary (Pet. Point 2). Moreover, when Mr. McCarthy challenged the validity of the ordinance in 1950 and made an application to have the property rezoned for residential purposes [R. 14-15] the findings of the Planning Commission and the City Council in denying said application make no reference to an

exercise of the police power or anything related thereto [Ex. 49, p. 2, lines 8-11; R. 21-28]. Likewise, the two zoning experts who testified for respondent, attempted to justify the zoning ordinance in question on grounds that had no relation whatsoever to the police power [R. 290, 306-307].

Respondent contends that the evidence sustains the finding of the trial court that reasonable minds might differ as to the suitability of petitioners' property for residential development (Ans. p. 6). It is to be noted that respondent concedes that residences may be safely constructed on petitioners' property (Ans. p. 13), but states the issue is, was petitioners' property "suitable for residential development" and that one factor for consideration is whether or not "the normal beach residences" would be "free from danger of destruction from the sea." Respondent does not define "The normal beach residence" nor is it mentioned in the evidence.

In support of its contention, respondent relies on the answer of petitioners' expert, Leeds, on cross-examination, referred to in the Petition (pp. 26-27).

The District Court of Appeal in reversing the judgment of the trial court correctly answered this argument when it stated:

> "That was not an answer that reasonable minds might reasonably differ as to the safety of houses *built on pilings*—it was an answer that such minds might reasonably differ as to the safety of houses built *in accordance with the scheme indicated on Exhibit 62.* As indicated by the answer, it might well be that engineers would not agree as to the safety of the one proposed solution,—and that a certain proposed solution might cause differences in

opinion as to the degree of safety. The fact that engineers might not agree as to the safety of a proposed plan, such as the one indicated on Exhibit 62, would not signify that engineers would differ in opinion as to the safety of houses built in accordance with other plans, such as higher, stronger, or differently arranged pilings." [R. 361.] (Italics the court's.)

This is made particularly evident by a consideration of the other testimony of the witness.

Colonel Leeds on cross-examination unequivocally testified that it was "feasible and practicable" to construct residences on petitioners' property [R. 202] and that they "would be perfectly safe" [R. 222]. This testimony was not contradicted. On cross-examination Colonel Leeds testified in part as follows:

> "Q. You don't feel then that the ground swells which you would expect on the basis of your experience would be such as to undermine or render unusable the portion of the property exhibited on Exhibit 62 as, in your opinion, suitable for residence development? A. No, sir. That's a particular reason that I would advocate construction of dwellings on pilings, so that if a totally unanticipated storm would occur, it would simply gouge out the beach. The house would still stand there because those pilings, according to the City Building Ordinance, which I think is wise, are required to be driven fairly deeply to 10 feet below mean lower low water. Therefore the storm could gouge out the beach several feet and the house would be perfectly safe.
>
> Q. It would be rather unsightly on the pier, seeing these pilings under the houses? A. At the time of any storm, the ocean front is unsightly, being spectacular, and when there is a cutting of the beach

such as that, it is rather quickly restored by the ocean forces." [R. 222-223.]

In answer to a question on cross-examination with respect to whether waves would reach the westerly line of the proposed 35-foot roadway, Colonel Leeds stated:

> "It would depend on what elevation the street were given. I think you have a pretty good indication of that from the existing profile. There is no indication that the right-of-way of the Pacific Electric was cut out in this region here; so far as I have been able to observe, there was no riprap deposited as was in the case up in the vicinity of Playa Del Rey." [R. 230].
>
> ". . . and I would say that that (35-foot strip) would be the extreme limit (of any wave). I think the best answer to that is: someone said, 'I know no better way of judging the future than by the past.' I realize it is possible to come south of the boundary of Manhattan Beach and see there that houses have stood. *Even though there is a sea wall in front of them, the beach has built up to practically level of that sea wall, and immediately joining the sea wall in Manhattan Beach there is no indication of serious cutting.*" [R. 230-231.]

Respondent states that the trial court's finding of unsuitability of the property for residential development finds support in certain purported facts listed under seven different paragraphs (Ans. pp. 13-14), most of which we have previously pointed out in this Reply are immaterial or unsupported by the evidence. Of the seven paragraphs there remains for discussion only the part of Paragraph 7 (Ans. p. 14) in which respondent states that "Any residences constructed on the property * * * unless protected by an adequate sea wall * * * would be subject

to constant hazard of destruction by the sea [R. 321]." The record reference is to the trial judge's oral ruling. A complete answer is, as we pointed out in the Petition (p. 27), that the trial judge admitted he was not an expert.

In any event, the language of the trial judge clearly demonstrates that the challenged ordinance went beyond the necessities of the case. The reasoning of the trial judge is to this effect [R. 321]: Unless protected by a sea wall residences on petitioners' property are subject to constant hazard from the sea; therefore all residences (whether protected by a sea wall or not) may be forbidden.

It is common knowledge that on both the Atlantic and Pacific Oceans, beach property has been developed and used for residential purposes. It is not sufficient that it is debatable that petitioners' property is not suited for residential development. The test is "whether the facts in the record rationally sustain" such contention (*Weinberg v. No. Pac. Ry. Co.* (C. C. A. 8th), 150 F. 2d 645, 652). We submit that respondent has failed to point out any competent evidence that supports the finding that reasonable minds might differ as to the suitability of petitioners' property for residential purposes.

Respondent states that it would appear obvious that if residences were constructed in the manner suggested by Colonel Leeds, ocean water might reasonably be expected on occasions to go over the eaves of any residences constructed thereon (Ans. p. 15) and respondent cites page

330 of the record, which are the remarks of the trial judge on oral ruling. Respondent fails to point out that the trial judge corrected his remarks a few pages later in the record where he said:

> "* * * if I created the impression that there would be a level of water up to the eaves, correct it, as that certainly was not my intention." [R. 341.]

Respondent in making such statement overlooks the 40 to 57 feet of accretions added to petitioners' property from 1935 to 1946 [R. 212-215]. This contention is also answered by Colonel Leeds in connection with his testimony to the effect of wave action on the 35-foot roadway where he stated:

> "But if [any wave reached the proposed 35-foot roadway] so, what? As I have said before, it would, under the most severe waves, scour out the beach, as it has in time past, to maybe a depth of 1 to 3 feet, and the succeeding lesser waves will fill it up again." [R. 230.]

Just previous to this testimony the witness also testified that:

> "* * * the crest of the beach is normally at around 12 to 15 feet, which indicates that that is as far as the waves have traveled landward with their suspended sand and have dropped it before they receded again into the ocean." [R. 230.]

Respondent contends that the testimony of the Chief of Police of respondent supports the relationship of said ordinance to public morals [Ans. p. 15]. It claims that

even though he wasn't familiar with police problems where homes were built on pilings, it was the same problem as he then had with respect to the municipal pier "since it matters not what structure is *over* the piling" (Ans. p. 16). The statement of this contention shows its fallacy. Police problems at a municipal pier which is open to the public and which is easily accessible are entirely different problems than would be experienced on private property occupied and used for residential purposes with access only obtained by trespassing on private property.

Respondent cites the case of *Cusack Co. v. City of Chicago,* 242 U. S. 526, involving the construction of billboards as supporting the validity of the ordinance in question. Said case is not in point. An ordinance of the City of Chicago prohibited the erection of billboards in any area "used exclusively for residential purposes" (p. 527) without first obtaining the consent in writing of one-half of the property owners on both sides of the street. The court pointed out that billboards as a class were distinguishable from buildings and fences. Such a limitation on the use of residential property does not begin to compare to the limitations placed on petitioners' property by the ordinance in question. There is no suggestion in the case at bar that residences on petitioners' property would be a nuisance (see *Seattle Trust Co. v. Roberge,* 278 U. S. 116, 122, distinguishing the *Cusack* case).

REPLY TO RESPONDENT'S POINT 3.

Motive of Legislative Body in Enacting the Ordinance in Question Was Material and Relevant on the Question of Its Validity.

Respondent contends that the ordinance in question was not actuated by improper motive and that none is shown by the evidence (Ans. p. 17). Respondent fails to acknowledge the obvious.

From 1924 to 1938 respondent claimed title to the property and clouded the title by a quiet title action. When respondent was unsuccessful in the litigation, it used every means at its disposal for the immediately succeeding three years to have some public agency assist respondent in an effort to acquire the property for public park purposes. When those efforts failed, respondent conceived and in 1941 consummated the idea of zoning the property for recreational purposes, thereby preventing any improvements from being constructed on the property and making it available for public use. The motive of respondent is characterized by Mr. Justice Schauer in his dissenting opinion in the Supreme Court of the State of California when he stated:

> "* * * it [the zoning ordinance in question] smacks more of calculated and arbitrary confiscation by a police state. Besides all that, I should like to think that the scheme here resorted to was beneath the honor of a self-respecting American municipality." [R. 387.]

Respondent states that no proper evidence of motive or purpose was before the court since no city official was called to the witness stand to testify as to the nature of the motive. The official acts of the legislative body of respondent as set forth in various resolutions and documents in evidence [Exs. 20 to 37, incl., 39, 40, 42 to 46, incl.] definitely establish the motive of respondent in enacting the zoning ordinance in question. Had respondent at the time of trial thought otherwise, it is difficult to explain why it did not call upon city officials to give testimony of a different motive.

Respondent asserts that the difficulty petitioners had in attempting to construct the fence in 1940 is not germane to the issue and the reasonableness of the zoning ordinance. The legislative body of respondent was informed almost a year prior to the enactment of the zoning ordinance of the difficulties petitioners had in enclosing their property [Ex. 37]. With such knowledge, respondent then adopted the zoning ordinance deliberately prohibiting all uses except for recreational purposes on the pretense that permitting a fee to be charged for its use would make the property income producing. This mask is shown by the provisions of the ordinance limiting its enclosure to a fence of *"open smooth wire"* and by prohibiting all structures allied with a beach recreation use.

REPLY TO RESPONDENT'S POINT 4.

General Zoning Principles Have No Application to the Case at Bar.

This court has long recognized the right of cities under a legitimate exercise of the police power to zone property. But on numerous occasions it has pointed out that the exercise of the police power is not unlimited, and that there is no unrestricted authority to accomplish what the public may presently desire. The police power is subordinate to constitutional limitations and where the zoning ordinance is arbitrary and unreasonable the courts will disregard mere form and interfere for the protection of the rights of the persons injuriously affected. We call the court's attention to the cases cited on page 31 of the Petition.

In its Answer (p. 22), respondent, under the heading "Conclusion," cites the case of *City of Miami Beach v. Hogan,* 63 S. 2d 493, in which this court denied certiorari, 346 U. S. 819. This case is not in point. The property owner there sought to *appreciate* the value of his property by having the zoning which had been in effect for thirty-two years changed to a more profitable use *after* the city had commenced an action to condemn the property for park purposes. In the case at bar, respondent *depreciated* the value of petitioners' property as a prelude to the institution of the condemnation proceedings.

Conclusion.

The District Court of Appeal of the State of California in unanimously reversing the judgment of the trial court said:

> "In practical effect section 10 of the ordinance, as applied to appellants' property, is confiscatory and constitutes a taking of plaintiffs' property for public use without compensation and without due process of law. Under the evidence here, said section, as applied to plaintiffs' property, is unconstitutional and invalid." [R. 365.]

We submit that the above conclusion of the District Court of Appeal is correct and that the majority conclusion of the Supreme Court of the State of California to the contrary, is erroneous.

For the reasons urged in the Petition and in this Reply, we submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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